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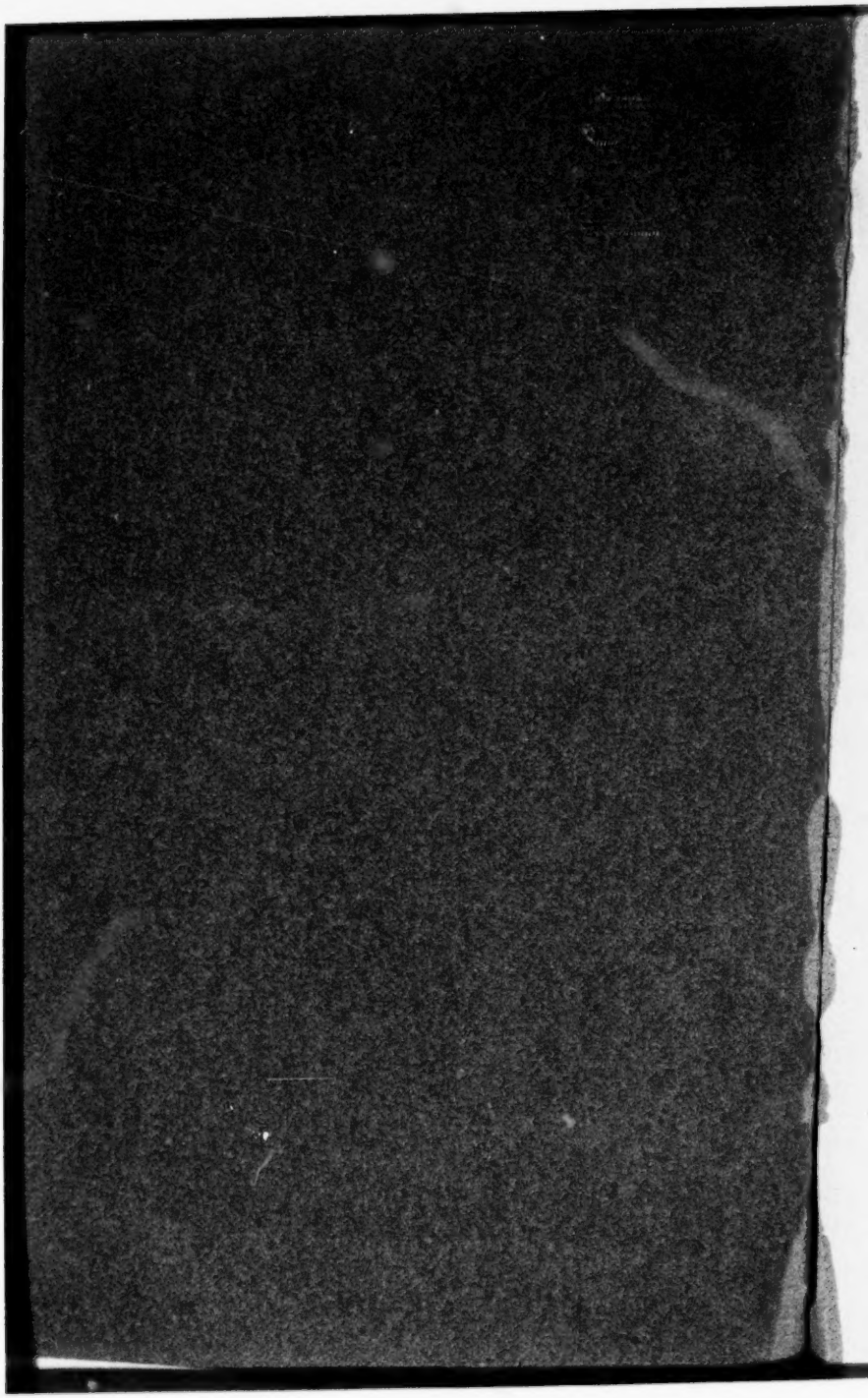

(16,899.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 314.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM VOIGT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1898.

1 United States Circuit Court of Appeals, Sixth Circuit.

THE BALTIMORE & OHIO SOUTHWESTERN Railway Company, Plaintiff in Error, vs. WILLIAM VOIGT, Defendant in Error.	No. 521. Error to the Circuit Court of the United States for the Southern District of Ohio, Western Division.

Before Lurton, circuit judge, and Severens and Clark, district judges.

By the COURT:

This was an action brought by William Voigt, the defendant in error, against The Baltimore & Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which, a fast passenger train, he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was traveling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above-mentioned contract between his company and the railway company. The answer of the railway company set up two grounds of defense. The first admitted that Voigt was an express messenger on its train, but denied that he was traveling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defense,
2 inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

"For a second and separate defense the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more em-

ployés of said express company should accompany said goods in said cars over the said line of said railroad and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employés of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employés or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company
3 from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company), upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employés of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said

express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company and not otherwise."

To this second defense a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a defense to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record finding the demurrer well taken. The opinion of the court sustaining the demurrer is printed in the record and published in 79 Fed. Rep., 560. The decision of the court went upon the ground that although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers traveling by a train of a common carrier,
4 and further that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff and the damages were assessed at the sum of $6,000.00, and judgment was thereupon entered that the plaintiff recover that sum with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defense of the answer of the defendant, and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company, which for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employés, and to which the employé agrees upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employé of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself from liability from the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and, therefore, upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction:

Question.

A railroad company, engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company in the conduct of its said

express business over said railway company's line, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express
5 business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company, to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

Does said railroad company assume, towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordi-
6 nary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employés of the railroad company?

It is further ordered that all proceedings in this case be stayed

until the instructions of the Supreme Court on the foregoing question be certified to this court.

HORACE H. LURTON,
C. D. CLARK,
H. F. SEVERENS,
Judges of the United States Circuit Court of Appeals for the Sixth Circuit.

May 26, 1898.

7 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of The Baltimore & Ohio Southwestern Railway Company *vs.* William Voight was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate was by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I have hereunto subscribed my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 26th day of May, A. D. 1898.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: (Certificate.) Case No. 16,899. U. S. C. C. of appeals, 6th circuit. Term No., 314. The Baltimore and Ohio Southwestern Railway Company, plaintiff in error, *vs.* William Voigt. Filed June 1st, 1898.

No. 314.

Supreme Court of the United States.

October Term, 1898.

Brief of Colston, Harmon, Goldsmith & Hoadly for P. E.

No. 314.

Filed April 10, 1899

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

WILLIAM VOIGT,

Defendant in Error.

Brief for Plaintiff in Error.

EDWARD COLSTON,
Attorney for Plaintiff in Error.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY, JR.,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM VOIGT,
Defendant in Error.

No. 314.

October Term, 1898.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Action was brought in the Circuit Court of the United States for the Southern District of Ohio, August 17, 1896, by William Voigt against The Baltimore & Ohio Southwestern Railway Company to recover the sum of $35,000 for personal injuries sustained by him on the 30th day of December, 1895, at Coal City, Hamilton County, Ohio, while he was in an express car hauled in one of the fast passenger trains of said railway company. The injury was caused by a collision between that train and another train of the said railway company going in an opposite direction.

Voigt was at the time in the employment of The United States Express Company in the capacity of express messenger in charge of express matter carried by the express company on the train of the railway company. The petition averred that Voigt was "travelling as a passenger for hire on one of defendant's trains, being an express messenger on said train." But, in fact, he was upon said train only by virtue of his employment as express messenger of said express company and of the contract hereinafter mentioned between said express company and said railway company.

To this action The Baltimore & Ohio Southwestern Railway Company filed an answer setting up two distinct defenses.

For a first defense the railway company admitted that on the 30th of December, 1895, Voigt was an express messenger on its train on said railroad, but denied he was at the time travelling as a passenger for hire. The railway company further admitted that the train came into collision with another of its trains on its railroad near Coal City, Ohio, and that in the collision Voigt sustained injuries.

For a second and separate defense the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the first day of March, 1895, it entered into a contract with The United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said con-

tract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company on the railway company's line between Cincinnati and St. Louis cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more employees of the express company should accompany said goods in the cars over the line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employees of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employees or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars, known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and injuries that he might sustain in the course of his said employment, whether occasioned by negligence

and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damage sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the said railway company) upon which he might be injured a good and sufficient release, under his hand and seal, of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company) in which said express company had agreed or might agree that the employees of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should enure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company) as fully and completely as if made directly with the corporation. In said defense it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St.

Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company and not otherwise.

To this defense a demurrer was interposed by Voigt on the ground that the allegations thereof did not constitute a defense to the action. Upon a hearing of that demurrer it was sustained and an entry was made in the cause, finding said demurrer well taken and sustaining the same; to all of which the railway company by its counsel excepted. (See opinion of circuit court sustaining the demurrer, 79 Fed. Rep. 561.)

Thereafter a stipulation in writing was filed in the case, agreeing that the issues of fact and law might be tried by the court without the intervention of a jury, and waiving a trial by jury. And thereupon the cause was tried upon the issues made by the petition and the answer aforesaid, and the court entered judgment in favor of the plaintiff for $6,000. To reverse that judgment The Baltimore & Ohio Southwestern Railway Company by writ of error removed the case into the United States Circuit Court of Appeals for the Sixth Circuit, where the error assigned was the sustaining of the demurrer of the plaintiff to the second defense of the answer of the defendant.

That court, after stating the case as set forth above, certified to this court the following question upon which it asks instruction:

QUESTION: Does said railway company assume towards said express messenger, while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railway company, pursuant to the contract aforesaid, the ordinary liability of a

common carrier for hire, so as to render said railway company liable as such to said express messenger, notwithstanding the contract aforesaid, for injuries he might sustain by reason of a collision between the train to which the said express car was attached and another train of the railway company, caused by the negligence of employees of the railway company?

ARGUMENT.

To give an affirmative answer to this question would require the court to decide that under no circumstances can a railway company permit any person other than one of its own employees to ride upon its train in any other capacity than that of an ordinary passenger. The railway company, by the contracts mentioned in this case, has taken the utmost precaution to define the status of this express messenger and to exclude him from the category of a passenger. If the railway company has not succeeded in this it is because words are inadequate to accomplish it. The affirmative contention would create a class of passengers known as *passengers in law*—passengers *in invitum*. But the relation of passenger and carrier is created by contract and can not exist without the consent of the carrier. By consent of the carrier is meant consent to receive the person *qua* passenger. A person who by contract uses a car fitted up as his own office or workshop, the railway company furnishing the car and the motive power, is not a passenger.

Chief Justice Paxson, in Pennsylvania Railroad Co. v. Price, 96 Pa. St. 267, defining the word "passenger," well says:

"Mere locomotion is not travel in the popular use of the term. There are conductors on short lines of railroad in this state who have passed over more miles in the course of their employment than any traveler of ancient or modern times. Yet we would hardly call them traveled men. The sense given to particular words by our great lexicographers is always entitled to weight. Yet where a word is used in an act of assembly regard must be had to the circumstances surrounding its use. A more correct definition of the word in its legal sense would be, one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor."

And again, speaking of the meaning of the word "passenger," he said:

"Had the question been asked of any person, intelligent or otherwise, upon this train when the accident occurred, whether A. J. Price, the deceased, was a passenger upon said train, the answer would have been in the negative, that he was employed upon the train as a mail agent. Why then should we give to the proviso a forced construction not warranted by its language and repugnant to our common sense?"

Louisville, New Albany & Chicago Railway Co. v. Keefer, 146 Ind., p. 21, is a case directly in point. The suit was by a messenger of the American Express Company against the railroad company for injuries sustained. The contracts between the express company, the messenger and the railroad company were exactly like those involved in the present case. The defense was precisely the same that we are making here, and it was held that the contracts were valid and that the defense was good.

The court in that case, after reviewing all of the authorities, thus states its conclusion:

"Under the doctrine declared in the Express Cases, *supra*, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in the cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant. Express Cases, *supra*; Bates v. Old Colony R. R. Co., *supra*; Hosmer v. Old Colony R. R. Co., *supra*.

"The contracts set out in the third paragraph of answer were not in regard to any duties appellant was required to perform as a common carrier, nor did such contracts attempt to limit the liability of appellant for negligence in the discharge of its duties as a common carrier, the same are therefore binding upon all the parties thereto. Appellee by his contract assumed all the dangers of the trip however occasioned, and undertook and agreed to release

and discharge appellant from all liability if he in any way should be injured in his person by the negligence of appellant, and authorized and empowered the express company to enter into a contract exempting appellant from all liability for injuries to appellee." (See pp. 34 and 35.)

Again, in P. C. C. & St. L. Ry. Co. v. Mahony, 148 Ind., p. 196, the Supreme Court of Indiana decided that contracts in every respect like the contracts which exist in this case were valid, and that therefore the express messenger was not a passenger in the ordinary sense of the term and that he could not recover for injuries sustained by the negligence of the railway company. The case was carefully considered in an elaborate opinion. Speaking of the contracts, the court said, p. 203:

"By the provisions of that contract the rights of the express company were fully measured. Its only right to be upon the tracks and right of way, through and by its servants, was by the provisions of that contract. Its license came only from the contract, and the appellee introduced the contract in evidence to show the right of his decedent to be upon the tracks. The express company, operating by servants, was present, on the occasion in question, by Romick, its agent. His rights were those of the express company, and could not be greater. He was there by the license given the express company, and he could not accept the license and reject the conditions upon which it was granted."

Again, in Blank v. Illinois Central Ry. Co., the Court of Appeals for the First District of Illinois has decided the same question in the same way, in an opinion rendered March 14, 1899, not yet published, but which we print as an appendix to this brief. Among other things, the court said:

"It was by virtue of the contract between the defendant and the express company that the plaintiff was upon the car when he was injured. He was not in the strict sense a passenger. Nor was the defendant in the strict sense a common carrier as to him. His being carried from one end of the express route to the other was for the purpose, and none other, of handling and caring for the property of his employer, the express company, which was being transported under the terms of the special contract between the express company and the defendant.

"It was not the duty of the defendant, as a common carrier, to carry for the express company its goods, or its messenger in charge of them, in the car in question. As a common carrier the defendant was not compelled to grant that right to the express company. It was only because of the special contract that such rights, superior to the rights of the public, were conferred, and being upon the car by virtue of such contract rights, the plaintiff was there subject to the burdens of the contract. His rights were those of his employer, the express company, and no greater. He could not accept the right to be there under the contract, and reject the conditions under which the contract gave the right."

Bates v. Old Colony Railroad, 147 Mass. 255, is also directly in point. That was an action brought by an express messenger for an injury sustained by the negligence of the railway company while he was running as express messenger on one of its trains. There was a contract between the railway company and the express company whereby the railway company agreed to transport express matter at a specific price, and to transport the express messenger in express car or baggage car *at season ticket rates*, less than regular rates. This ticket was paid for by the express company, and was upon condition that the messen-

ger should assume all risk of accident or injury resulting therefrom and hold the railway company harmless from all accident or injury received while being thus transported. The messenger also signed a contract with the railroad, reciting that, in consideration of being allowed to ride on the express or baggage car for the more convenient dispatch of his business as expressman, he would assume all risk of injury and hold the railroad company harmless. The railway company thereupon issued to the express company a season ticket for the plaintiff. He received his injuries while riding on this ticket in the express car. The rules of the railroad company prohibited passengers from riding in the express or baggage car unless they had signed a release. The express business over the railroad company's line was carried on by express messengers riding in the baggage car attached to passenger trains. The Supreme Court of Massachusetts held that plaintiff was not a passenger and was not entitled to recover, and that the contract was perfectly valid. Among other things the court said:

"The contract in question was made to give him a right which did not belong to him as a passenger. The plaintiff, having the rights of a passenger, desired to ride in the baggage car. The regulations of the defendant, as well as personal prudence, forbade him to ride there, and, if he had attempted to do so, he not only would have assumed all the risks of injuries resulting therefrom, but would have been liable to be expelled from the car by the defendant." (See p. 265.)

And again on p. 266:

"The question of the right of carriers to limit their liability for negligence in the discharge of their duty as

carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case. See Railroad Co. v. Lockwood, 17 Wall. 357; Griswold v. New York & New England Railroad, 53 Conn. 371. It was not a contract for carriage over the road, *but for the use of a particular car.* The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. The contract by which he obtained what he sought did not impair his rights as a passenger, and he was under no compulsion to enter into it."

So, in Hosmer v. Old Colony R. R. Co., 156 Mass., p. 506, the plaintiff was an express messenger riding on a season ticket permitting him to ride in the baggage car where passengers were not permitted to ride. For "the more convenient dispatch of his business as an expressman" he was allowed to ride there. In consideration of being allowed to ride in the baggage car he agreed to assume all risks resulting therefrom. The plaintiff, while riding in the baggage car in the prosecution of his business as an expressman, was injured by the derailment of the train owing to an obstacle left upon the track by the employees of the railway. The engine, baggage car, smoking car, two day passenger coaches and a Pullman car were derailed. Four cars remained on the rails. Twenty-three passengers were killed and sixty or seventy wounded. The injured were "scattered through the various cars including those that remained on the track." It was held the plain-

tiff could not recover. He was held not to be a passenger because by his contract he was permitted to ride, not for the purpose of travel, but in the prosecution of his private business, in a place not intended for passengers. The court said:

"The place where he was riding was one in which the defendant was under no obligation to carry him. The contract gave the plaintiff a privilege which he sought for his own convenience." (See p. 508.)

These cases distinguish between persons who use cars as a place of business and those who use them as a means of locomotion. The object for which one contracts to use a car is the criterion which determines whether he is or is not a passenger.

In Hughson v. Richmond & Danville R. Co., 2 App. Cas. (D. C.), p. 98, Chief Justice Alvey, speaking for the court, held that a Pullman porter, though not a co-servant with the employees of the railway company, "yet was not a passenger in any such sense as to require of the railroad company the highest degree of skill and care in the construction and maintenance of its roadway and machinery, and the operation of its road and the running of its train, such as are required in the case of a passenger." (See p. 103.)

In Griswold v. N. Y. & N. E. R. Co., 53 Conn., p. 371, where a restaurant keeper having the privilege from the railroad company to sell on the trains, sandwiches, fruits, etc., and as part of the arrangement the company permitted the boy engaged in the selling to ride for that purpose on a free pass, the Supreme Court of Connecticut held that the boy could not recover for injuries sustained on the train occasioned by the negligence of the company's servants.

Under the auspices of the Union News Company this kind of boy has become familiar to all travelers. He is known as the "butcher." It seems a shock to common sense to say that he is necessarily a passenger; and that therefore his own and the Union News Company's contract of release to the railroad company are void.

It is begging the question, or reasoning in a circle, to say that this express messenger was a passenger, and that therefore the contracts relied upon as a defense are void. He could only be deemed a passenger by breaking down those very contracts, for it is they that show he is not a passenger. We are not aware of any statute or rule of law which prohibits a railway company from permitting a person to ride upon its cars in some other capacity than that of passenger, if such person desires to ride that way for the privilege of being allowed to use a separate car to conduct a business along the line.

Our adversaries say that public policy is a barrier to the making of such contracts. But we inquire, where is there a definition, such as that, of public policy? Public policy is a convenient resort in many cases to enable a party to avoid a contract. Cutting down contracts that people have entered into of their own free will and for their own advantage is a dangerous proceeding. A court could hardly be worse engaged. Nothing can be claimed as a rule of public policy unless it clearly exists. The court can not call up such rules for the occasion.

The famous utterance of Burrough, J., in Richardson v. Mellish, 2 Bing., at p. 252, seems peculiarly applicable here. He said:

"I, for one, protest, as my lord has done, against arguing too strongly upon pubilc policy; it is a very unruly

horse, and when you once get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

This animal, we think, carried the learned circuit judge far afield in the present case.

It may not be absolutely correct to say "public policy" is never argued "but when other points fail," yet resort to it can not be otherwise justified in this case.

This statement of Burrough, J., has been cited approvingly many times; a conspicuous instance is its use by Lord Bramwell in Mogul Steamship Co. v. McGregor (1892), A. C., at p. 45. Lord Bramwell also quoted a statement of Cave, J., made in *In re* Mirams (1891), 1 Q. B. 594, as follows:

"As we all know, certain kinds of contracts have been held void at common law on this ground—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as *interpreters* of the law than as *expounders of what is called public policy.*" (Italics ours.)

Lord Bramwell modestly added he would venture to make another remark, which he did as follows:

"No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?" (See p. 45.)

And so we ask, how can any judge say this contract contravenes public policy? There has been no evidence that it does so. It has not been shown that accidents are more frequent on railroads that carry express messengers under such contracts as exist in this case than on railroads that do not. The responsibility arising from having express matter, often consisting of articles of great value, would

afford, one would think, an additional incentive to the observance of care by the operating company.

We also add the pertinent observation of Lindley, M. R., in the Court of Appeal, in Underwood & Son, Limited, v. Barker (1899), 1 Ch., at p. 305:

"And to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is, *prima facie* at all events, contrary to the interests of any and every country."

The highest court in the state in which this contract was made, the Supreme Court of Ohio, has well said, in P. C. C. & St. L. Ry. Co. v. Cox, 55 Ohio State, at p. 515:

"The liberty of contract, being one of those rights secured by our constitution, is not to be restrained upon any insufficient or mere fanciful conceit of what may possibly happen. The citizen who is *sui juris* has a right to make a contract beneficial to himself when neither immoral, fraudulent nor illegal, and he should not be restrained in the exercise of such right unless the public welfare clearly compels it."

This was in a case where that court held that a contract between an employee and a railroad company was valid, although it was a contract whereby an employee, by entering "The Voluntary Relief Department," agreed to a deduction from his wages of seventy-five cents per month, to form, with like contributions from other employees and from the railroad company, a relief fund for the benefit of employees in case of sickness, accident or death; and he also agreed that, in case of accident, the acceptance by him of relief from the fund would have the effect to release the company from liability for damages. On the particular question whether the contract was against public policy the court said:

"To be so, it must, in some manner, contravene public right or the public welfare. It must be shown to have a mischievous tendency, as regards the public. And this should *clearly appear.*" (Italics ours.)

The United States Circuit Court of Appeals has said:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy."

Hartford Fire Insurance Co. v. Chicago, M. & St. P. Ry., 70 Fed., at p. 207.

Sir G. Jessel, M. R., said:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Printing & Numerical Registering Co. v. Sampson, Law Rep., 19 Eq., p. 465.

In Tallis v. Tallis, 1 Ell. & Bl., at * p. 412, Lord Campbell, C. J., in overruling a plea setting up that the contract sued on was void as in restraint of trade, said:

"And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold the contract void."

In Rousillon v. Rousillon, Law. Rep., 14 Ch. Div , 365, Fry, J., speaking of Tallis v. Tallis, said:

"In other words, the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of showing that it was plainly and obviously clear that the protection extended, by the proposed exclusion of the defendant's publications, beyond what the plaintiff's interest required. And such, in my opinion, ought to be the rule of law upon this point, because the defendant is seeking to put a restraint upon the freedom of contract, and he who does that must, I think, show that it is plainly necessary for the purposes of freedom of trade. I adopt the views expressed by the Master of the Rolls, in Printing & Numerical, etc., Co. v. Sampson, as to the necessity of courts being careful how they invade the freedom of contract."

In the present case Voigt was a man "of full age and competent understanding," and the contract was entered into by him "freely and voluntarily." Voigt indemnified the express company and the express company indemnified the railway company. If Voigt recover from the railway company it in turn can recover from the express company, and it in turn can recover from Voigt. To obviate such circuity the railway company can avail itself directly of the contract between Voigt and the express company, and the effect is the same as if Voigt had entered into the contract with the railway company directly. (Phœnix v. Erie, 117 U. S. 397.) Indeed, Voigt agreed that the contract should enure to the benefit of the railway company. (See certificate, p. 3.) Voigt also expressly ratified the agreement between the express company and the railway company. (See certificate, p. 6.) The railway company is in effect defending for the express company. Voigt's

contract operates as an assignment to the railway company of any cause of action he has against it. The "paramount" public policy to consider is, therefore, that you are not lightly to interfere with that contract, and where it is claimed there is a public policy which destroys that contract, it must be made to clearly appear that the "public interest would be sacrificed" by the stipulations found in the contract. We claim no public interest is sacrificed by the contracts in question. The grounds upon which a common carrier is not permitted to stipulate against its own negligence are well understood, and do not exist in this case. Those grounds are that such stipulations are efforts to release the common carrier from duties imposed by law; that the parties do not deal on equal footing; and that such stipulations tend to a relaxation of that vigilance which the carrier should exercise. None of these objections can be urged against this contract.

Voigt was not a passenger of the railway company nor even its employee.

II.

THE RAILROAD COMPANY WAS NOT A COMMON CARRIER OF THE EXPRESS COMPANY, ITSELF A COMMON CARRIER, NOR OF THE EXPRESS COMPANY'S GOODS, NOR OF ITS MESSENGERS.

The express company was the only common carrier of the goods which were in charge of Voigt. The railroad company merely hired to the express company that car and the necessary power to move it. The railroad company

entered into no contract with the owners of the goods carried in the express car; received no compensation for their carriage; had no custody of the goods nor any lien on them for freight. None of the features which indicate the relation of carrier and shipper existed as between the consignors of the goods and the railroad company.

In Bank of Kentucky v. Adams Express Co., 93 U. S., p. 174, this court holds that a railroad company supplying a car and motive power to an express company is mere agent of the express company, and that the express company is liable for the negligence of the railroad company to the same extent as though the negligence were its own. In the case cited certain packages of money received by the express company to be carried from New Orleans to Louisville were lost by fire caused by the giving way of a railroad trestle owing to decayed timbers. In that case the court said:

"The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody; either of the express company, or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them, and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences

of that conduct. If anyone is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency, but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it." (See p. 182.)

In that case the court below had charged the jury that if the express company exercised due care in selecting a safe railroad to carry the goods, it had discharged all the duty it owed to its patrons; but this the court held was an erroneous view; and, that the railroad company was the mere agency of the express company to affect the transportation, which the express company had undertaken.

Suppose the express company, instead of hiring a part of the train to carry on its independent business of a common carrier, preferred to run its own cars over the roadbed of a railroad company, paying a stipulated price for the privilege, can it be doubted that the railroad company might lawfully contract that it would not be liable for injuries to the servants or goods of the express company occurring in the operation of such trains?

The railroad company not being a common carrier of the goods that were being hauled in this car at the time of the accident to Voigt, how did it become a common carrier of the messenger, who was himself the servant of the carrier of the goods? The hauling of the messenger does not grow out of any contract between him and the railroad

company, but is a mere incident of the express company's hiring the railroad company to carry its goods.

When the railroad company agreed with the express company to haul goods and also an employee, who goes along as a representative of the express company for the purpose of caring for the goods and seeing to their delivery, it no more assumes as to such messenger the obligation of a carrier than it assumes it towards the express company in respect of the goods carried for it.

The express company is not the shipper or consignor of the goods, but merely hires from the railroad company facilities for performing obligations of its own as a common carrier. Does it make any difference whether the express company performs its duties as a common carrier by means of instrumentalities which it owns and operates or by instrumentalities which it hires others to employ?

All the requirements dictated by public policy for the control of carriers are satisfied when the express company is held to the liability of a common carrier. Public policy does not go further and require a double responsibility, namely, that that of the railroad company should be added to the responsibility of the express company. Can it be doubted that the railroad company might, in its contract with the express company, require as a term of the hiring that it be held to no responsibility for the goods? Would any public interest be sacrificed by such an arrangement? The public has delivered its goods to the express company and has secured its responsibility as a common carrier for their safe transportation. Would it be any concern of the public thereafter upon what terms the express company employed the railroad company to do its work of carrying the articles? Whatever those terms might be, the com-

on carrier responsibility of the express company would continue.

The railroad company, in carrying out the contract of hire between it and the express company, in no sense acts as a common carrier. Such is clearly the doctrine of this court in the Express Cases (117 U. S., p. 1). In those cases this court traced the history of the express business in the United States and elsewhere. It showed that at the very beginning of the business in 1839 in this country the idea was that Harnden was the only party responsible for the goods. His advertisement is shown in the report of the case to be as follows:

"Wm. F. Harnden, having made arrangements with the New York and Boston Transportation and Stonington and Providence Railroad Companies, will run a car through from Boston to New York and *vice versa*, via Stonington, with the mail train daily, for the purpose of transporting specie, small packages of goods, and bundles of all kinds."

Such continues to this day to be a correct statement of the method of continuing the business. His followers in the business, the present express companies, are today doing exactly that thing, namely, running a car "through with the mail train daily." The express business is theirs and not the railroad companies'. Express business has become a distinct business, requiring special methods for its conduct. It is further described and dealt with in the same Cases as the business of

"Receiving and forwarding upon railroads, steam vessels and other vehicles of rapid transportation, in a safe and secure manner, and with the greatest practicable expedition, in the special care and custody of its own employees, and at destination personally delivering packages of money

or currency, gold and silver bullion, bonds, bank notes, deeds and other valuable papers, jewels, silks, laces and other articles of great value, requiring for their security extraordinary care and precaution, and also parcels of goods, wares and merchandise requiring great dispatch or careful handling, and also fruit, vegetables, fresh meats, fish, oysters, fish spawn and other articles liable to decay or other injury from delay; and also live animals requiring particular care and attention during transportation; and also for receiving and forwarding for collection bills, notes, drafts and accounts, and receiving and returning payment thereof; and also for receiving and forwarding all articles of trade and commerce, with the bills and charges of the shipper thereto attached, to be collected of the consignee on delivery of such articles and returned to shipper; and in so doing to afford the public, under a single contract and on assured responsibility, safe, reliable and speedy transportation from and to all points accessible only over two or more railroads, and generally to perform for the public all offices that, by usage, are incident to the class of carriers now well known, recognized and designated by the public as 'express carriers'." (See p. 3.)

It is a kind of business that railroad companies are unfitted to conduct successfully. Railroad companies can not sort out certain highly valuable articles, like jewelry, money, bonds and notes, nor perishable freight, such as live animals, requiring special attention, from the great mass of freight and put the same in charge of special messengers. In consequence of these conditions there has come into existence a special class of carriers, well known, recognized and designated by the public as "express carriers." They have taken upon themselves the conduct of this business. They have provided themselves with special facilities for doing it, and the

conduct of this business by express companies has satisfied the entire public want. The law therefore regards the railroad companies as not being common carriers as to this express business. There is a clear line of demarkation separating that business from the ordinary business of a common carrier by rail. Therefore it is a recognized right on the part of railroad companies to hire themselves to one express company without being obliged to do the like for another express company, which would not be the case were the railroad companies common carriers *quoad hoc*; for then they would be obliged to perform the same service for all.

In the Express Cases the court said:

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and, in fact, it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time." (See p. 21.)

Again the court said:

"The reason is obvious why special contracts in refer-

ence to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner *its own particular duties*. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given

to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." (See pp. 23 and 24.)

It is to be observed that in all the cases involved in the decision in the Express Cases the contracts provided the railroad company should be exempted and indemnified by said express company against all loss or damage to goods or money transported by said express company. It is entirely proper that such contract for exemption should be made. The contract is entirely in line with the relation which exists as to the express business between the express carrier and the railroad company. A railroad company, in hauling one of these express cars, is no more a common carrier than a steamboat would be as to a barge it is towing under a contract for hire, although the steamboat at

the same time is on its regular trip with its load of passengers. The language of this court in the Express Cases, that "it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers," is convincing; *for, if the railroad companies are not common carriers of this business, as they are not, it leaves them in the category of mere hirers of certain facilities to the express companies, and that relation permits the railroad companies in making their contracts to incorporate terms excluding the liability of common carrier.*

This court has further said:

"A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

Railroad Co. v. Lockwood, 17 Wall., 377.

III.

THERE ARE OTHER CASES IN WHICH A RAILWAY COMPANY PERFORMING A TRANSPORTATION SERVICE IS NOT DEEMED TO ACT AS A COMMON CARRIER.

A company incorporated for the purpose of carrying on the business of a common carrier of persons and property may make many contracts which are not contracts for performing its public functions as a common carrier, and as to such contracts there is no doubt that their validity is not interfered with by the inhibition placed upon common carriers to contract for exemption from negligence. It is clear that disability to make a contract for such exemption does not depend upon the corporate existence or corporate character of the company. The disability grows out of the particular business to which the contract relates, and with reference to which it is made. It is not true that every service rendered by a railroad company with reference to transportation of persons or of goods is necessarily a service by it in its capacity of a common carrier of persons or of goods. A railroad company generally performing the duties of a common carrier may perform a transportation service which it is not compellable, by virtue of its character of a common carrier, to perform, and as to such service will not be a common carrier. Examples of this are found in the class of cases such as Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, where it was held that a railway company which had agreed to furnish men and motive power to transport a circus of the plain-

tiff from Cairo to Detroit on cars belonging to the plaintiff, stopping at certain named points of exhibition, the plaintiff paying a fixed price therefor, was not liable as a common carrier and that such transportation was not a transaction with a common carrier as such; and that it was not the duty of a common carrier to transport special trains, and that the contract was valid and the railway company was not liable for injury due to negligence.

The same thing was decided in the case of Chicago, M. & St. P. Ry. Co. v. Wallace, 66 Fed. Rep. 506, by the United States Circuit Court of Appeals of the Seventh Circuit. The court, in its opinion, puts the argument thus:

"Why could not the railroad company say: 'You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well, if you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed.' There is nothing unlawful in this, unless we assume that the railroad company can not carry property or persons at all, except as common carriers, *which is against all rule and precedent.* No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract.

The railroad company as a common carrier could not enter into such a contract as this, because it can not as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find. In Hutchinson on Carriers (2d Ed., Sec. 44) it is stated:

"'A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and, where this is the effect of a special arrangement, a carrier is not liable as a common carrier, and can not be proceeded against as such.'

"Again, at Section 73, it is stated:

"'And, even as to such carriers as are *prima facie* public or common carriers, it may be shown that in the particular instance, or under the circumstances of the case, they do not undertake to transport, and are not liable as common carriers.'" (See p. 511.)

The court then quotes other passages from the same author, notably Sections 56a and 56b of paragraph 2.

We respectfully submit that all of this reasoning is applicable to the hauling by a railroad company of an express car. It makes no difference whether the express car is actually owned by the express company or by the railroad company. It is for the time being rented to the express company and is lettered and marked with its name.

The same thing was decided by the Supreme Court of Massachusetts also in Robertson v. Old Colony Railroad Co., 156 Mass. 525. The court there said:

"Unless the defendant was under a common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a comomn carrier, and the plaintiff can not recover. The only right which the plaintiff had to be on the train was by virtue of a contract which the defendant had made with the proprietors of a circus, whose servant the plaintiff was. By the terms of this contract, the defendant agreed to liaul certain cars belonging to the circus proprietors, according to a schedule of time fixed by the agreement, by which the work was to be done at eighteen different times, and nearly all of it at night. * * * The contract was simply to haul the cars as they were. This contract the defendant had the right to make, as it was under no obligation to draw the cars as a common carrier."

It must be conceded that a contract exempting a railroad company from liability for injury to express goods or express messengers can not be deemed as tending to endanger the lives of railway employees or of passengers. Therefore, none of the objections which exist against an attempt of a common carrier to release himself of his common carrier's liability would apply.

Contracts like the one in question have been held valid in the state of Massachusetts in the cases of Bates v. Old Colony Railroad Co., 147 Mass. 255, and Hosmer v. Same, 156 Mass. 506, cited *supra* on another point.

The same appears to be the law in the Province of Ontario in the case of Jennings v. Grand Trunk Ry. Co., 15 Ont. App. 477. That court made the decision turn exclusively upon the question whether there was an express contract to the effect that defendant should not be liable for injury to the express messenger, whether caused by

negligence or otherwise, and in the absence of such contract, held that defendant was liable for such negligence.

IV.

CASES CITED BY THE CIRCUIT COURT IN ITS OPINION BELOW (See 79 Fed. Rep. p. 561) TO SHOW THAT AN EXPRESS MESSENGER IS A PASSENGER WOULD NOT SUSTAIN THAT CONTENTION WHERE THERE ARE CONTRACTS BETWEEN THE RAILWAY COMPANY, THE EXRESS COMPANY AND THE EXPRESS MESSENGER SUCH AS EXIST IN THIS CASE.

The circuit court said:

"It seems to be well settled that an express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire." (See p. 562.)

The court cited the following authorities for the proposition:

Fordyce v. Jackson, 56 Ark. 594.
Blair v. R. R. Co., 66 N. Y. 313.
Brewer v. R. R. Co., 124 N. Y. 59.
Kenney v. R. R. Co., 125 N. Y. 422.
Woodworth v. R. R. Co., 26 O. S. 585.
Thomas v. R. R. Co., 79 Ky. 160.
Jones v. R. R. Co., 125 Mo. 666.
Jennings v. R. R. Co., 38 U. C., Q. B. 15 Ont. App. 477.

Yoemans v. Co., 44 Cal. 71.
Ketcham v. R. R. Co., 133 Ind. 346.
Chamberlain v. R. R. Co., 11 Wisc. 248.
R. R. Co. v. Wilson, 79 Texas, 371.

These authorities do not bear out the statement broadly enough to cover the present case. If the proposition that an express messenger is a passenger be correct at all, it is only so in the absence of contract on his part assuming the risks and waiving claims for injury. In none of the cases cited by the court was there any such contract on the part of the messenger. The only contract in those cases, where there was any contract at all, was one between the express company and the railway company exempting the railway company from liability to the express company. A review of the cases will show this to be correct:

Fordyce v. Jackson, 56 Ark. 594. The train on which the express messenger was riding was derailed by a bull and a rotten bridge. It affirmatively appeared that there was no contract between the express company and the railway company, or by the express messenger for the benefit of the railway company, whereby he agreed to assume the risk of injury. Nor did it appear that there was any contract between the express company and the express messenger, whereby he agreed to assume any risks. Indeed, whether the express messenger was a passenger or not was but little considered.

Blair v. Erie R. Co., 66 N. Y. 313. The messenger entered into no contract either with, or for the benefit of, the railroad company. The contract between the express company and the railway company provided for no indemnity to the railway company against injuries to the express messenger.

Brewer v. N. Y. L. E. & W Ry. Co., 124 N. Y. 59. The only contract existing was between the express company and the railway copmany. The railway company agreed to carry free of charge for the express company, its messengers, wagons, horses and grain, not exceeding three carloads in a month, and as well all packages, money, bank notes, etc., including the safes. It was then provided that in consideration thereof the express company "assumes all transportation risks and other liabilities whatsoever arising in respect thereof, and agrees to fully indemnify and protect the railway company therefrom." The court held that this general provision of the contract did not relieve the railway company from liability for injury caused by negligence; that in order to accomplish such purpose there must be a distinctly expressed intent in the contract, and that general words would be insufficient for the purpose. Speaking of the relation of the express messenger to the contract, the court said:

"It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption or implied understanding that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employee of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and although he paid no fare to the defendant, was carried by virtue of no contract made by him person-

ally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily, by that fact, chargeable with notice of the provisions in question of the contract. Presumptively he was entitled to protection against personal injury by the negligence of the defendant." (See p. 64.)

But in the present case Voigt was carried by virtue of a contract made by him personally with the express company, wherein he stipulated he would claim no damages against any railway company whose facilities the express company hired to enable it to do the express business. While lawfully on this car he was there under the terms of a contract to which he was a party.

Kenney v. N. Y. C. & H. H. Ry. Co., 125 N. Y. 422. Was an action for damages by an express messenger against the railway company for an injury. The only contract was one between the express company and the railway company. The only part of it relating to the subject was in the following words: "And the said party of the first part (the railroad company) is hereby expressly released from, and guaranteed against any liability for any damage done to the agents of the party of the second part, whether in their employ as messengers or otherwise." There does not appear to have been any assent to or knowledge of this contract on the part of the messenger. The court, after referring to the recent decision in the Brewer case, said:

"Our decision, however, is placed upon the ground that this contract does not in unmistakable language provide for an exemption from liability for the negligence of the defendant's employees. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents; but that, to

accomplish that object, the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis.*" (See p. 425.)

The only thing there decided was that the particular contract under consideration did not cover release for injury occurring by negligence. In the present case, however, it does.

Pennsylvania Railroad Co. v. Woodworth, 26 O. S. 585. The only thing decided was that the act of the express messenger in accepting employment, whereby he was required to occupy a place on the train more dangerous than was occupied by an ordinary passenger, was not in and of itself an acceptance by him of risks resulting from the negligence of the railway company in the management of its trains not peculiar to the nature of the messenger's business. There was no question in that case as to whether he was a passenger or not, nor as to the effect of a special contract.

Thomas v. Railroad Co., 79 Ky. 160. The express messenger was killed off duty and while returning home from one of his "runs." He had no connection whatever at the time with the express business, though he was entitled by a contract between the railway company and the express company to ride free. It was not disputed by anyone in the case that he was a passenger. On the contrary, such was the contention of the railway company. (See p. 163.) Its contention was that, being a passenger, his proper place was in the passenger coach and not in the

baggage car, and that by being in the baggage car he was guilty of negligence that would defeat his recovery, inasmuch as passengers in the other cars were not hurt.

Jones v. St. Louis, etc., Ry. Co., 125 Mo. 666. This was the case of a Pullman car porter who was injured in a collision caused by the negligence of the conductor and engineman of his train in leaving a station before the arrival of a train coming from the opposite direction. The principal question in the case was whether the porter and the railroad conductor were fellow-servants. It was held they were not. There was a contract between the porter and the Pullman Car Company, whereby he agreed to release the Pullman Car Company, and also any railway company over whose lines the Pullman Car Company should operate, from any claim for damages for personal injuries received by him; but the contract did not *ipsissimis verbis* mention negligence, *nor was there any contract by which the Pullman Company agreed to indemnify the railway company.* The court, while being of opinion that the porter was to a limited extent an employee of the railway company, held that he was not an employee in such sense as to constitute him a co-servant. The court also said that he was entitled to the rights of a passenger. But that was not at all essential to the decision, because the conductor being guilty of want of ordinary care, that alone was enough to render the railway company liable to any employee not a fellow-servant. To entitle the plaintiff to recover it was not necessary to hold that he had the rights of a passenger.

Yomans v. Contra Costa S. N. Co., 44 Cal. 71. Plaintiff kept a bar on a steamboat and also acted as express agent for the Wells Fargo Co. There was no contract

whatever between the plaintiff and the defendant regulating the question of its liability to him. Nor did the question whether he was a passenger necessarily arise in the case. His right to recover in no manner depended upon his being a passenger. The defendant operated a transportation line form San Francisco to Petaluma, part of the way by steamboat and the remainder of the way by a short railroad. As the plaintiff was on the platform at the railway station, about to enter the car, the boiler of the engine exploded and he was hurt. The liability in the case was made to depend on the want of ordinary care on the part of the engineer, and not upon his failure to observe the highest degree of care that human foresight could provide, as would be the rule in regard to a passenger. It is true the court refused to instruct the jury, at the instance of the defendant, that the plaintiff was not a passenger. But the court did not charge the jury that *he was* a passenger and *did not* charge that the defendant was required to observe anything more than ordinary care.

Chamberlain v. Railroad Co., 11 Wis. 248. An examination of the opinion of the court shows it was not decided whether the express messenger was a passenger or an employee of the railway company. (See pp. 258, 259.)

Railroad Co. v. Wilson, 79 Texas, 371. Plaintiff in the case was a mail agent, and this case belongs to the class of cases to be considered under the next heading, and which are governed by a very different principle from that of an express messenger operating under such a contract as in this case. It is true the court said in its opinion that:

"Essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents, or messengers and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances."

But this is not to be taken as an adjudication that an express agent might not enter into such contract as would prevent him from occupying the relation of passenger to the carrier. The broad statement that in every case in which a carrier receives and agrees to transport a person not in its employment such act necessarily establishes the relation of passenger and carrier is certainly not correct where the transportation is controlled by a contract regulating the liability and is a mere incident to conducting a business carried on by another and not by the carrier.

Jennings v. Grand Trunk Railway, 38 U. C. (Q. B.), another case cited by the court below, further illustrates the difference between the cases relied upon by defendant in erorr and the case at bar. In that case the court said:

"The answer to the defendants' next objection, namely, that the deceased was being carried under a special agreement with his employers, by which the defendants were absolved from liability for accidents occurring through their negligence, is, *that no such agreement was proved in fact*. The only agreements of which any evidence was given, were made, not with the defendants but with the Great Western Railway Company; and even if it be assumed that the defendants were working under the terms of

the second agreement, viz., the letter of the 4th April, 1879, that contains no stipulation in regard to indemnity, as did the expired agreement of the 1st January, 1874. We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers was essential to be proved in such an action as this, as the learned chief justice at the trial, held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct.

"In the absence of actual notice to the deceased that he was travelling at his own risk, that agreement might well be regarded, as between the railway company and the injured party, merely as a contract by the express company to indemnify the railway company.

"See Alexander v. The Toronto & Nipissing R. W. Co., 33 U. C. R., 474; 35 U. C. R., 453, and Gallin v. The London & Northwestern R. W. Co., L. R., 10 Q. B., 212.

"There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely. It can hardly be necessary now to cite authorities upon this point."

C. C. C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, also one of the cases cited by the court below, was that of a postal clerk travelling on a photograph commission from the government requesting railroad companies to transport him free, and directing that wherever fare was demanded he should take a receipt. At the time of the injury the clerk was not on duty, but had gotten upon a train to go from Cincinnati to Indianapolis. He first entered the pas-

senger coach and afterwards went into the postal car, and while there, at the request of the clerk in charge, was assisting in the handling of the mail at the time the injury occured.

V.

CASES OF POSTAL CLERKS IN UNITED STATES RAILWAY MAIL SERVICE.

All cases concerning injuries to this class of persons may be laid aside for the reason that postal clerks in no manner assume any risk of negligence, and in no respect waive any right or claim for damages. They enter into no contract. They enter upon the postal car in obedience to instructions from government. Their carriage is incidental to the contract with government, which contract contains no limitation as to terms on which the agent is carried. (See § 4000 R. S.) It does not concern the clerk what the arrangement between the superintendent of mail service and the railway is. Whatever it may be the clerk does not assent to it.

Comment on these cases is not necessary, except to call attention to the case standing at the head of the list, Seybolt v. the N. Y. L. E. & W. R. R. Co., 95 N. Y. 562, which clearly states the ground upon which these cases are distinguishable. The postal clerk had a pass, upon the back of which was endorsed a stipulation for an exemption from liability for damages on account of injuries occurring through negligence. The court held that the railway company, under the statute under which the mails were carried, had no right to impose that condition, and that for that reason the condition was void. The position of

the court is shown by the following extract from the opinion (at p. 574):

"The absolute duty of providing a car for the transportation of the mail, and of carrying such mail and the persons in charge thereof, is imposed by the statute, and an imperative obligation for its performance rests upon the corporation accepting the public mails for the purpose of transportation. An attempt by such a corporation to impose any other conditions upon the performance of this service than those provided by the statute, would be illegal and ineffectual to shield it from the consequences of its wrongful acts.

"It is not claimed that the superintendent of the railroad mail service, to whom this pass was delivered, had authority to enter into any contract on behalf of the government. Neither is it claimed that any contract has been made by the defendant with any other officer of the government, exempting it from liability for injuries, sustained by mail agents on account of its negligence.

"This defense must, therefore, rest upon the proposition that a person to whom is secured an absolute statutory right to transportation over a railroad, forfeits his right to damages for an injury inflicted upon him through the negligence of such railroad corporation, by the involuntary acceptance of a voucher containing provisions, intended by the corporation, to exempt it from liability for its negligence, although the person receiving it supposed it was intended solely to facilitate the enjoyment of his right of transportation.

"We are of the opinion that the agent's acceptance of the pass under the circumstances of this case did not indicate an intention to assent to the provisions therein contained, and even if it might be so construed, that the want of a consideration for such an agreement rendered it *nudum pactum*. A promise by one party to do that which he is already under a legal obligation to perform has fre-

quently been held to be insufficient as a consideration to support a contract." (Vanderbilt v. Schreyer, 91 N. Y. 392.)

It thus seems clear that a postal clerk stands on an entirely different footing from an express messenger who has made a contract with his employer that he will assume all risk incident to transportation, whether occurring by negligence of the transportation company or otherwise.

VI.

The court below, while admitting, as we understand, that the railway company is not obliged to receive an express messenger on board of its trains, yet says when it does receive him it must necessarily receive him as a common carrier. We submit that this is a *non sequitur*. If the railway company, by reason of its character of common carrier, is not compellable to receive either the express company's goods or its messenger, the railway company is certainly at liberty, when it does receive either, to receive them upon such terms as it sees fit to make, provided such contract contains no element that would render it void if made between parties confessedly not occupying the relation of common carrier.

The court below seemed to be of opinion that the Express Cases decided that a railroad company owes a duty to the public as a common carrier to do the express business, either by itself or another, and that, therefore, when a railroad company contracts with an express company for express business it is employing the express company to perform its and not the express company's duties; and that, therefore, in such matters the railroad company can

only contract on terms permitted to a common carrier in respect of a matter that falls within its public duty. An additional argument of the court was, as it seems to us, that because a railroad company is ordinarily a common carrier of passengers it can receive no person other than its employees on its train in any other capacity. We submit that the Express Cases do not warrant the conclusion which the court seems to have drawn in deciding the case below. On the contrary, this court said:

"The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines." (See p. 27.)

This court said in another place:

"If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried, notwithstanding the termination of their special contract rights." (See p. 28.)

"The exact question, then," said the court, "is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." (See p. 26.)

The conclusion this court came to was that railroad companies are not charged by law with the duty of carrying

all express companies as they are with the duty of carrying all passengers and freight. And in another place the court said:

"And the real question is not whether the railroad companies are not authorized by law to do an express business themselves, nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person specially employed for that purpose."

We submit this court did not mean by this to hold that the railroad companies are bound as common carriers to do this express business for the public at large, because that question was manifestly not before it, as the court was most particular to state, more than once. We think the proper view is quite the reverse of the one which the court below took. Instead of the railroad company becoming a common carrier when it agrees to haul an express car, the express company is the one that incurs that liability and the railroad company is its mere agent, as was held in Bank of Kentucky v. Adams Express Co., 93 U. S. 174, *supra*.

The court below treated this case as falling within the reasoning of this court in the Drover's case (Railroad Co. v. Lockwood, 17 Wall. 357), but we think there is a great difference in principle between the two cases. In the Drover's case the railway company was confessedly a common carrier of cattle. It held itself out as such, and, to use the language of this court in that case it is "more accurate to say that common carriers are such by virtue of their occupation, not by virtue of responsibilities under which they rest." Being a common carrier of live stock, the railway company agreed that the compensation paid

for carrying the cattle should also include compensation for carrying the drover. He was received by the railway company unquestionably as a passenger, and the effort was to limit its liability to a passenger in case of negligence. The opening sentence of the opinion shows this. The court said:

"It may be assumed, *in limine*, that the case was one of carriage for hire; for though the pass certified that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

In the Drover's case the decision is, that as the common carrier was obliged to carry the drover upon a passenger train if he presented himself and paid his fare, it could not carry him in any other capacity on a freight train, when the money paid for carriage of cattle covered his fare for transportation in the caboose. That case presents a very different state of facts from the present case. To make the present case analogous to the Drover's case it would be necessary to find the railway company doing an express business and carrying on the same train some owner of a valuable express package, who desired to give it special attention, and whose carriage was covered by the price paid for transportation of the express parcel.

The court below further endeavors to distinguish the present case from the cases cited by us, known and called the Circus Cases. The court said that in these cases the contract with the railway company was not one of carriage, but merely one of hauling or towing cars by locomotives

of the railway company, and that the freight and passengers were not entrusted to the railway company in the manner in which merchandise and passengers received by the company are entrusted to it. We fail to recognize the distinction. In the present case the contract of the railway company was not one of carriage. The carriage was being performed by the express company, as was held in Bank of Kentucky v. Adams Express Co., *supra*. Express matter is not entrusted to the railway company in any manner. As we have before shown, the railway company has no contract with the owners of the goods, it has no lien on the goods for freight, it is not charged with the receipt of the goods, and we insist that the railway company stands in the exact relation of one hauling or towing an express car.

Respectfully submitted,

EDWARD COLSTON,
Attorney for Plaintiff in Error.

JUDSON HARMON,
A. W. GOLDSMITH,
GEORGE HOADLY, JR.,
Of Counsel.

Cincinnati, March 31, 1899.

APPENDIX.

At a term of the Appellate Court, begun and held at Chicago, on Tuesday, the seventh day of March, in the year of our Lord One Thousand Eight Hundred and Ninety-Nine, within and for the First District of the State of Illinois.

Present, Hon. Henry V. Freeman, Presiding Justice; Hon. Oliver H. Horton, Justice; Hon. Henry M. Shepard, Justice.

Be it remembered, That on the 14th day of March, A. D. 1899, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figure following, to wit:

JOHN B. BLANK, JUNIOR,
Plaintiff in Error,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Defendant in Error.

No. 7629.

ERROR TO THE SUPERIOR COURT OF COOK COUNTY.

STATEMENT.

The contracts referred to in the opinion are as follows:

First: The contract between plaintiff and the American Express Company, viz.:

"Whereas, I, the undersigned, have entered or am about to enter the employment of the American Express Company, and in the course of such employment may be required to render services in the care, carriage or handling of merchandise and property in course of transportation by cars, vessels and vehicles belonging to the different railroad, stage and steamboat lines upon which the company relies for its means of forwarding property delivered to it to be forwarded.

And, whereas, such express company, under its contracts with many of the corporations and persons owning or operating such railroad, stage and steamboat lines, is or may be obligated to indemnify and save harmless such corporations and persons from and against all claims for injuries sustained by its employees.

Now, therefore, in consideration of the premises and of my said employment, I do hereby assume all risk of accidents and injuries which I shall meet with or sustain in the course of my employment, whether occasioned or resulting by or from the gross or other negligence of any corporation or person engaged in any manner in operating any railroad or vessel, or vehicle, or of any employee of any such corporation or person, or otherwise, and whether resulting in my death or otherwise.

And I do hereby agree to indemnify and save harmless the American Express Company of and from any and all claims which may be made against it at any time by any corporation or person under any agreement which it has made, or may hereafter make, arising out of any claim or recovery upon my part, or the part of my representatives, for damages sustained by reason of my injury or death, whether such injury or death result from the gross negligence of any person or corporation, or of any employee of any person or corporation, or otherwise.

And I hereby bind myself, my heirs, executors and administrators with the payment to such express company, upon demand, of any sum which it may be compelled to

pay in consequence of any such claim, or in defending the same, including all counsel fees and expenses of litigation connected therewith.

And I do further agree that in case I shall at any time suffer any such injury, I will at once, without demand, and at my own expense, execute and deliver to the corporation or persons owning or operating the railroad, stage or steamboat line upon which I shall be so injured, a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury, or connected with or resulting therefrom.

I do hereby ratify all agreements heretofore made by said express company with any corporation or persons operating any railroad, stage and steamboat line in which such express company has agreed in substance that its employees shall have no cause of action for injuries sustained in the course of their employment upon the line of such contracting party, and I agree to be bound by each and every such agreements in so far as the provisions thereof relative to injuries sustained by employees of the company are concerned, as fully as if I were a party thereto.

And I do hereby authorize and empower said express company, at any time while I shall remain in its service, to contract for me and in my behalf, in its own name or in mine, with any corporations or persons operating any railroad, stage or steamboat lines, for my transportation as a messenger or employee free of charge, upon the condition and consideration that neither I nor my personal representatives, nor any person claiming under me, will make any claim for compensation because of any injury sustained by me, whether resulting from the gross negligence of such corporations or persons, or of any employee of such corporations or persons, or otherwise, and the contracts so made shall be as binding and obligatory upon me as if signed and delivered by me.

And I do hereby further agree that the provisions of this

agreement shall be held to inure to the benefit of any and every corporation, and of all persons upon whose railroad, stage or steamboat lines the American Express Company shall forward merchandise, as fully and completely as if made directly with such corporations or persons.

I do further agree, in consideration of my employment by said American Express Company, that I will assume all risks of accident or injury which I shall meet with or sustain in the course of such employment, whether occasioned by the negligence of said company or any of its members, officers, agents or employees, or otherwise, and that in case I shall at any time suffer any such injury I will at once execute and deliver to said company a good and sufficient release, under my hand and seal, of all claims, demands and causes of action arising out of such injury or connected therewith, or resulting therefrom; and I hereby bind myself, my heirs, executors and administrators with the payment to said express company, on demand, of any sum which it may be compelled to pay in consequence of any such claim or in defending the same, including all counsel fees and expenses of litigation connected therewith.

Witness my hand and seal this 20th day of Nov., one thousand eight hundred and 93.

(Signed) JNO. BLANK.

In the presence of
(Signed) S. A. DAVIS."

Second: The contract between the American Express Company and the defendant, viz.:

"Whereas, by a certain contract, dated the 20th day of March, A. D. 1893, the Illinois Central Railroad Company, as party of the first part, and the Yazoo and Mississippi Valley Railroad Company, as party of the second part, and the American Express Company, as party of the third part, among other things, agreed as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first part and second parts and each of them, their respective officers and employees, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employees, agents, messengers or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Epxress Company.'

And whereas, since making said contract, said parties have in the interests of mutual economy, upon certain trains and upon certain lines, consolidated the work of the baggageman employed by the party of the first or second part, with the work of the express messenger employed by the party of the third part—so that the same person acts as joint employee of the party of the first or second part and the party of the third part, a portion of his salary being paid by the party of the first or second part and the balance by the party of the third part, in pursuance of an agreement to that effect heretofore made by the parties hereto.

Now, therefore, in consideration of the premises and other valuable considerations, each to the other paid, the said parties hereby mutually agree that the said contract,

and the clause therein which is above quoted, shall be, and the same is hereby modified and changed to read as follows:

'As one of the express conditions of this contract, the party of the third part hereby binds and obligates itself to save harmless and fully indemnify the parties of the first and second parts, and each of them, their respective officers and employees, from and against all actions and liabilities for loss or damage resulting in any manner whatsoever to the freight or express matter in charge of the party of the third part, or to any of its employees, agents, messengers, or officers, upon any line covered by this agreement; it being distinctly understood and agreed that all damages resulting to express matter or to persons in the service of the party of the third part (while engaged in such service) shall be borne by the American Express Company.

'Provided, however, that in all cases where the same person acts jointly as baggageman for the party of the first or second part, and express messenger for the party of the third part, then that any sum or sums paid out in settlement or satisfaction of any claims made, or judgment recovered, on account of injuries sustained by such joint employee while performing duties exclusively in the interest of the party of the first or second part, outside of and away from the car in which the baggage and express packages in his charge are carried, while travelling as aforesaid, on said road, shall be assumed and borne by the party of the first or second part. But, if any claim is made, or judgment recovered, on account of injuries sustained by any such joint employee while travelling as aforesaid, on such road, while performing duties in the interest of either or any of the parties hereto, in or upon the said baggage and express car, then such sum or sums shall be borne and paid by both or all of the parties hereto, in the same proportion as they may have contributed to the salary of such employee at the time such injuries were sustained by him. Neither party, however, shall have the right to compromise

or settle any claim or suit for such injuries without the consent in writing of the other parties hereto.'

This contract shall be in force and take effect from and after the 28th day of December, 1895, and continue until the 31st day of March, 1898.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By J. T. Harahan, 2d Vice-President.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By J. T. Harahan, 2d Vice-President.

THE AMERICAN EXPRESS COMPANY,
By A. Antisdel, General Manager."

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiff was a messenger for the American Express Company, on the defendant's line of road between Chicago and Sioux City, Iowa. On January 15, 1896, the passenger train on which he was riding in the baggage car, in which the express matter he had in charge was being carried, ran into the rear corner of the caboose of a freight train which had been partly pulled off upon a switch or side track in order to permit the passenger train in which plaintiff was riding, to pass. The rear end, only, of the caboose projected upon the track of the passenger train, and a piece of one of its timbers broke into the express car and hit the plaintiff and caused the injuries of which he complains.

It appeared in evidence that the first cause of the caboose being left in its dangerous place, was the breaking of a link in the chain of freight cars that were being hauled off

upon the side track, causing the freight train to separate and leaving its extreme end—the caboose—projecting in part upon the main track.

Whether or not the defendant was liable for negligence in respect of the broken link, and the consequent collision, will not be discussed at length by us at this time, although we have considered the case in that aspect. The evidence showed, without controversy, that the defect in the link which caused it to break was a latent one beyond discovery by the exercise of all reasonable diligence; but whether, after the break, there was not time enough before the collision, in the exercise of proper diligence by defendant's servants, to have got the caboose clear of the main track is not so certain.

We prefer to place our decision upon the point that caused the trial court to take the case from the jury, by a peremptory instruction to find the defendant not guilty.

That point is, that whether there was legal negligence by the defendant or not, the plaintiff had by special contract, previously entered into, released the defendant from all liability in the premises.

We will not particularly enter upon the contention of plaintiff that such contract of release was improperly admitted in evidence under the condition of the pleadings at the time of the trial. It is enough for the purpose of getting directly at the main question in the case, which demands early decision, because not only of what is involved in this case, but collaterally, to hold, without much discussion, that the release was admissible.

The plaintiff had testified to his employment with the express company, that he knew the terms of his employment and that they were set forth in the writing identified by him as bearing his signature. The writing was then, we think, clearly admissible under the general issue, in order to show the terms and conditions of plaintiff's employment by the express company, and his relation to the defendant at the time of the accident.

The relationship of express companies to railroad companies, over whose lines express matter is carried under special contracts, is well set forth in Express Cases, 117 U. S. 1, to which we refer rather than quote from, and the doctrine there upheld is that special contracts between such companies, giving special and exclusive privileges to express companies are lawful.

It was by virtue of the contract between the defendant and the express company that the plaintiff was upon the car when he was injured. He was not in the strict sense a passenger. Nor was the defendant in the strict sense a common carrier as to him. His being carried from one end of the express route to the other, was for the purpose and none other of handling and caring for the property of his employer, the express company, which was being transported under the terms of the special contract between the express company and the defendant.

It was not the duty of the defendant as a common carrier, to carry for the express company its goods, or its messenger in charge of them, in the car in question. As a common carrier the defendant was not compelled to grant that right to the express company. It was only because of the special contract that such rights, superior to the rights of the public, were conferred and being upon the car by virtue of such contract rights the plaintiff was there subject to the burdens of the contract. His rights were those of his employer, the express company, and no greater. He could not accept the right to be there under the contract and reject the conditions under which the contract gave the right.

Had the defendant occupied in the premises the position of performing a public or *quasi* public duty to the plaintiff, such as it would have held to him if he were being carried as an ordinary passenger, we understand the law would not have permitted him to contract away his right of recourse for damages for the defendant's negligence. And in no case could a common carrier, even by express contract, in

Illinois, exempt itself from liability resulting from the gross negligence or willful misconduct committed by itself or its servants.

C. & N. W. Ry. Co. v. Chapman, 133 Ill. 96.
I. C. R. R. Co. v. Read, 37 Ill. 484.

But, under the evidence, there does not arise in this case any question of gross or willful negligence.

As already said, the defendant was not as to the plaintiff, or his employer, in the discharge of the public duties required of it as a common carrier, and the plaintiff might, therefore, as he did, contract to assume the risks of the trip himself, and release the defendant from all liability on account of injuries to him.

The plaintiff in his contract with the express company ratified, as his own, and made a part of such contract, the contract between the express company and the defendant, and agreed to be bound thereby. He was bound, therefore, to know that the express company and himself as its representative, had right to ride in the car only by special license, which he could not accept and at the same time continue to hold defendant liable for injuries that might befall him.

It is not pretended that what we have said constitutes an exhaustive or thorough opinion upon the question. It is one not yet decided by our supreme court, and the little we have said is mainly, though imperfectly, taken from opinions of the Supreme Court of Indiana, which commend themselves to us by the reason and authority there shown. A reference to Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, and Pittsburgh, etc., Ry. Co. v. Mahoney, 148 Ind. 196, where similar contracts were involved, and able discussion is had, will serve the purposes of counsel in this case, and the profession generally, as well as could be done by an exhaustive opinion here.

Numerous minor questions are argued, concerning which we discover nothing amounting to reversible error or requiring further comment.

The judgment of the superior court is affirmed.

I, Thomas N. Jamieson, Clerk of the Appellate Court, in and for the First District of the State of Illinois, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL] THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

No. 88.

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On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD COLSTON,
Attorney for Plaintiff in Error.

Junior Member,
A. V. Goldsworthy,
Graham Dobkins, Jr.,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Baltimore and Ohio South-western Railway Company,
Plaintiff in Error,

No. 88.] *vs.*

William Voight,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In reply to the brief filed by defendant in error in this case, we desire to submit the following considerations:

The defendant in error submits that "by an almost unanimous consensus of authority the rights of an express messenger are those of an ordinary passenger."

The defendant in error submits a list of cases which he claims supports the proposition. The cases and authorities thus submitted are those that are reviewed in the original brief for the plaintiff in error, except the following:

Chamberlain v. *Pierson*, 87 Fed. Rep. 420.

Hutchinson on Carriers, sec. 564.

Ray, Negligence of Imposed Duties, 9.

A. & E. Encyl. of Law, 512.

In none of these cases or authorities was there any contract whereby he agreed and undertook to assume the risks of the negligence of the railway company, and in that all-important feature the cases and authorities differ from the case under consideration.

In *Chamberlain* v. *Pierson*, 87 Fed. Rep. 420, it was held that the express messenger had no knowledge of the contract between the express company and the railroad company whereby the express messenger was to be furnished free transportation at his own risk while in the service of the express company, and was not for that reason bound thereby. (See second clause of syllabus.)

Hutchinson on Carriers, sec. 564, states the result of the decisions only in cases where there was no stipulation of any sort on the part of the messenger.

Ray, Negligence of Imposed Duties, p. 9, in stating the proposition that an express messenger is a passenger, and that an agreement by the express company to assume all transportation risks as to its property and express messenger, and to indemnify the railway company, will not deprive the messenger of his rights as a passenger to protection against the negligence of the railway company, adds the important qualification: "*Unless he had knowledge of such an agreement.*" (Italics ours.) *The express messenger in this case had such knowledge.*

In 5 A. & E. Encl. of Law, p. 512, the statement of the law is made with the same qualification. It is as follows:

> "Where a railroad company, *without any express contract*, undertakes to carry an express messenger in a car provided by it for the use of the express company, it owes to him the same duty to use every reasonable precaution to carry him safely that it owes to an ordinary passenger." (Italics ours.)

These authorities are all inapplicable to this case by reason of the important difference referred to.

Counsel for defendant in error claims in his brief (p. 4) that the relation between a United States postal clerk and a railroad which carries him with the mail matter is analogous to the relation existing between an express messenger and a railroad company which carries him with express matter.

Stated in this form, we admit that the analogy exists. But the statement does not present the feature of the present case which distinguishes it from the case of the postal clerk and the case of the express messenger as it is stated. The omitted feature is that the express messenger has agreed in terms that he will not hold the railroad company responsible for any injury he may sustain by negligence or otherwise, and it is only upon the faith of that agreement that he is allowed to enter the train.

Counsel for defendant in error further states in his brief (p. 4), that neither in the case of the mail carriage nor in the case of the express carriage is the railroad company obliged to enter into the contract of transportation.

It is indifferent to us whether this statement be true as to the carriage of the mail, *but the statement that the railroad company is under no obligation to enter into a contract with the express company for the carriage of express matter on passenger trains, is an admission of highest importance in this case*, because, if the railroad company were obliged *by law* to carry express matter on its taains, it would be obliged to carry with it a messenger in charge. In such case it would be difficult to see how a railroad company could carry such messenger on any other terms than as a passenger.

Counsel for defendant in error says in his brief (p. 4), that the contract with the railway company (we presume he

refers to this case) is silent as to any release of liability by the express messenger, "although," he adds, "the railway company, as to liability for the latter" (express messenger) "is guarded by an indemnity from the express company."

We are unable to appreciate the importance of the point that counsel is here making. The contract between the railway company and the express company in the case under discussion provides an indemnity to the railroad company by the express company against any claim of liability on the part of any express messenger growing out of any personal injury which an express messenger may sustain, whether such personal injury be caused by negligence or otherwise. It would have been impossible for the express company to execute any release to the railroad company for injuries done to a third person. All the express company could, in the nature of things, do was to furnish an indemnity. It could not control or release a cause of action in favor of a messenger. But the express messenger himself, in making the contract with the express company, agreed to pay the express company any sum which it might be compelled to pay under the indemnity, and agreed to execute and deliver to the railway company a good and sufficient release under his hand and seal of all claims, demands, and causes of action arising out of any such injury, and did ratify all agreements made by the express company with the railway company in which the express company had agreed its employes should have no cause of action; and the express messenger did agree to be bound by each and every of the agreements mentioned in the contract between the railway company and the express company, and he did further agree that the contract between him and the express company should inure to the benefit of the railway company as fully as if it had been made with the railway company directly.

We fail to see how any contract more direct or positive than this could under existing circumstances have been

made. It shows that the express messenger understood, when he entered the service of the express company, to operate this express route, he was assuming all the risk of personal injury that might arise from negligence or otherwise.

Counsel for defendant in error cites a number of cases to show that a postal clerk is regarded as a passenger for hire.

It is unnecessary to point out, further than we have done in our original brief, that the distinction between a postal clerk and the case of this express messenger rests in the fact that this express messenger has released the railway company from all liability, and that the postal clerk does not do so, but on the contrary is carried under a contract made by the government with the railroad company, which contract is silent on the subject of responsibility for any personal injury sustained by the postal clerk, thus leaving the clerk all the remedy he otherwise had.

Counsel for defendant in error also cites the case of *Commonwealth* v. *Railroad Co.*, 108 Mass. 7, where it was held that the seller of popped corn who had paid a price for the privilege of selling it on trains, and held a season ticked entitling him to ride for the purpose of carrying on his said business, was a passenger within the General Statutes, chap. 63, sec. 97. The season ticket in that case provided as follows :

> "The corporation assumes no liability for any personal injury received while in a train to any season ticket holder."

It was held that this limitation constituted no defense to an indictment under the statute for causing death by gross negligence. The difference between this case and the case of *Hosmer* v. *Railroad Co.*, 156 Mass. 506, and 147 Mass. 255, which were express messenger cases, seems to rest in

the fact that express messengers were permitted as a special privilege to ride in a part of the train not intended for passengers, while the pop-corn man conducted his business in that part of the train set apart for passengers only.

Counsel for defendant in error incorrectly states our contention as being one resting on the proposition that the relation of the messenger to the railroad company, which he assumes to be that of passenger and common carrier, is *changed* by the messenger's entering into the contract in this case, which proposition counsel says answers itself.

He omits to state the very point of our contention, which is, that the messenger did *not* establish between himself and the railroad company the relation of passenger and common carrier, nor was it established for him. It is an assumption on the part of counsel for defendant in error to say that such relation ever existed. The reason why the relation of passenger and common carrier did not exist between this messenger and the railroad company is because the messenger had no right upon the train except by the consent of the railroad company, and this because of the purpose for which he desired to be upon the train; a purpose different from that for which the rest of the public desired to use the train, and a purpose different from that for which the train was provided. We understand counsel to admit in another part of his brief that the only right the messenger had to be upon the train was by virtue of the special contract. (See brief, pp. 4, 7.)

The citation from *Railroad Co.* v. *Lockwood*, 17 Wall. 376, used by counsel for defendant in error in this connection, is not at all apposite. The language referred to was used in reference to an attempt on the part of the common carrier to modify his liability concerning a duty which the law cast upon him by virtue of his occupation as common carrier. The reasoning which the court condemned as unsound was the proposition that a common carrier could by

special contract lower himself to the level of an ordinary bailee, and thus acquire the capacity to make a contract which as a common carrier he could not make. To reason so was to reason in a circle. But here the railway company was not a common carrier as to this business, and therefore had the right to enter into the contracts in question, and those contracts did not alter any legal relation established between the messenger and railway company, for none had been established.

Counsel for defendant in error (brief, p. 15) seems to argue that, because the contract between the express company and the railway company did not in terms disclaim the railway company's liability as a common carrier to the express messenger, but instead required that the express company should protect the railway company and hold it harmless, this was an acknowledgment or admission on the part of the railway company that it did assume the common carrier liability to the express messenger, and only took the indemnity as a guaranty against the consequence of such liability.

This, we submit, is an assumption on the part of opposing counsel. There is no such admission in the contract between the railway company and the express company. The liability against which, by the contract with the express company, the railway company seeks protection, is not described as a common carrier's liability. The language is:

> "That the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employes of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employes or otherwise."

The particular kind of liability is not mentioned. It

may have been only a liability for want of ordinary care, or may have been liability for want of the highest degree of care of which human skill and foresight is capable. There is no admission that the railway company understood that it was providing against the consequence of a common carrier liability already incurred. The object of the contract was to prevent the common carrier liability from arising.

Counsel for defendant in error also seems to claim that the railway company cannot in this case avail itself of the contract between the express company and express messenger because of want of privity between the messenger and the railway company. But we think this claim is unfounded. As already stated in our original brief, if the express messenger should recover a judgment against the railway company, the railway company would then recover over against the express company, and the express company would recover over against the express messenger; and to avoid such circuity the railway company may plead this as a bar to the messenger's action. (*Phoenix Ins. Co.* v. *Transportation Co.*, 117 U. S., at 325.)

Counsel for defendant in error endeavors in his brief (p. 21), as we understand it, to prove that the Massachusetts cases relied on by us, cited in our original brief, are contrary to the rule established by this court in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, and are therefore no authority. He endeavors to show that the rule in Massachusetts was that a common carrier might, by contract with the passenger, exempt itself from liability for injury occasioned by its negligence. But such is not the Massachusetts rule, as is shown by the case of *Doyle* v. *Fitchburg Railroad Co.*, 166 Mass., at p. 496, where the Supreme Court of Massachusetts approves *Railroad Co.* v. *Lockwood*.

The case cited by us of *Bates* v. *Old Colony R. Co.*, 147 Mass. 255, and *Hosmer* v. *Same*, 156 Mass. 506, hold that a person desiring to ride in the baggage car of a passenger

train for the purpose of conducting the express business is not *quoad hoc a passenger*, and that therefore the carrier may make a valid contract with him exempting the carrier from liability for injury to such express messenger, even though it be occasioned by negligence of the carrier.

In *Bates* v. *Old Colony R. Co.*, the court said:

> "It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff."

The only difference between the Bates case and the Hosmer case rests in the fact that in the Bates case the accident to the train involved only the express car; but in the Hosmer case it involved the greater portion of the train, and the question was whether the stipulation exempting from liability applied where the injury would as likely have happened if the messenger had been riding elsewhere in the train.

In *Quimby* v. *Boston & Maine Railroad*, 150 Mass., the only question involved was whether an exemption of liability for negligence in a gratuitous pass was good. The court held that the exemption was good, for the reason that a person holding such pass was not in any proper sense of the term a passenger. The court said:

> "The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform, and is outside of his regular duties. In yielding to the solicitation of the passenger, he consents for the time being to

put off his public employment, and to do that which it does not impose upon him. The plaintiff, was in no way constrained to accept the gratuity of the defendant; it had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing, as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously, to be responsible to him in damages for the negligence of its servants. It is well known that, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention. It is hardly reasonable that, beside the gift of free transportation, the carrier should be held responsible for these, when he has made it the condition of his gift that he should not be. Nor, in holding that he need not be under these circumstances, is any countenance given to the idea that the carrier may contract with a passenger to convey him for a less price on being exonerated from responsibility for the negligence of his servants. In such a case the carrier would still be acting in the public employment exercised by him, and should not escape its responsibilities, or limit the obligations which it imposes upon him." (See p. 371.)

In *Doyle* v. *Fitchburg Railroad*, 166 Mass. 492, it was held where the pass was not a gratuity the party using it would be a passenger, and an exemption from liability would be void.

Counsel for defendant in error claims that the Statutes of Massachusetts (Pub. Sts., chap. 112, sec. 188) made railroad companies common carriers of the express business, and consequently of the messengers and employes in charge of such business. But the Supreme Court of Massachusetts holds that the statute does not have that effect. In *Bates* v.

Old Colony Railroad, supra, speaking of this statute the court said:

> "The statute cannot be construed to require railroad corporations to discriminate in favor of express companies, and to carry their merchandise and messengers in the baggage cars of passenger trains on reasonable terms, equally favorable to all express companies." (See page 267.)

It seems clear, from an examination of the Massachusetts cases, that there is no difference between the rule adopted by that court and the rule adopted by this court on the subject of a common carrier exempting himself from liability to a passenger for injuries occasioned by negligence.

Counsel for plaintiff in error puts a great many supposed cases in his brief, such as that of a sick passenger being taken on a stretcher into a baggage car, or of a physician being called to attend an express messenger in a car in case of sudden illness, or of a passenger train breaking down in a wilderness and the passengers being obliged to ride to a place of safety in a baggage car or upon an engine, and asks whether the railroad company could in such cases *extort* a release from liability for negligence. It is clear the railroad company could not do so. The reason is because in all the instances supposed the persons had been accepted by the railroad company as passengers.

Counsel for defendant in error claims in his brief (p. 25) that the only thing this court decided in the Express Cases (117 U. S. 1) was that a railway company is not bound to act as a common carrier for all express companies that choose to apply, and that under the reasoning employed in that case a railway company *is* compellable by law to carry some one express company's business on its passenger trains, together with its messengers, safes, and also to provide a car specially appointed for express business.

Such is clearly not the decision made by this court in the Express Cases. That action was brought against the railway company by a single express company to compel the railroad to give the express company the right to do express business on that road. It was not an action brought by an excluded express company to obtain *equal* right to do the express business over the line of railroad already enjoyed by some other express company. This court in its reasoning considered that the question whether the railway company should be compelled to carry *any* express company depended solely upon whether it could be compelled to carry all express companies; that there was no such thing as a public duty to carry one express alone. To show that the railway company did not owe a public duty to carry all, and consequently not a public duty to carry any, the court entered into a careful examination of the nature of the express business and showed that it was impracticable to conduct the business over a line of railroad otherwise than under the limitations and restrictions imposed by a special contract with some particular company. The court said:

> "The exact question, then, is, whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried." (See page 26, at bottom.)

That is to say, if not charged with the duty of carrying *all*, they were not charged with the duty of carrying *any*. Among other statements made by the court to distinguish the express business from the ordinary business of a common carrier of freights, the court adverted to the fact that no rail-

road company had ever held itself out as a common carrier of express companies (see page 21); that no railroad company had ever in practice taken an express company upon its line of railroad "except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties are carefully fixed and defined." (Id.)

The reasons making special contracts for this business necessary are summarized by the court as follows: (1) the business is one requiring speed, and reasonable certainty as to the quantity that could be carried at any one time, and the space to be allotted therefor; (2) that the things to be carried are to be kept in the personal custody of a messenger or other employe of the express company, and therefore require a certain amount of car space to be specially set apart for the business, and that the goods to be in the exclusive possession of the expressman; (3) that as the business to be done is "express," access to the train for loading at the latest, and for unloading at the earliest, convenient moment, was necessary; all of which, said the court, was "entirely inconsistent with the idea of an express business on passenger trains free to all express carriers." (See p. 23, at bottom.) The court then showed that railroad companies, being by law carriers both of persons and property, had from the beginning provided passenger trains for the transportation primarily of persons and of their baggage, being a service requiring promptness and comfort to the passengers, and said that the express business on passenger trains was in a degree *subordinate* to the passenger business, and that it was consequently the duty of the railroad company in arranging for the express to see that there was as little interference as possible with the wants of passengers; all of which, said the court, "must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve

another company in the same way, and still perform its other obligations to the public in a satisfactory manner." (P. 24.) The argument of the express cases is therefore clear, that if the railroad company can not serve all express companies alike, owing to the nature of the business, it is a business it is not required *as a common carrier* to do.

Counsel for defendant in error in his brief (p. 37), says:

> "We concede without question that the contract between the express company and the railroad company, so far as it grants exclusive privileges to the express company, is a private contract, and that the fare of the messenger is covered by the contract, and to that extent his right to be on the train depends upon the contract and his employment by the express company."

Then counsel adds:

> "But that does not affect his status as a passenger or his right to safely travel."

This is a paradox! Conceding that the right of the messenger to be on the train depends upon the contract between the railway and the express, and that the contract is a private contract, that is to say, one not depending upon the public occupation of the railway as a common carrier, how is it possible for the express messenger to claim under such a contract the rights of a passenger? To the contract between the railway and the express, this messenger became a party by his agreement with the express company to pay whatever damages it should be required by the railroad company to pay to it on account of any claim of the messenger for injury, whether sustained by negligence or not, and by his further agreement to deliver to the railway a release of liability for any such injuries. Certainly, in the sense in which the term passenger is used in this case, there is no

such thing *as a passenger having no right of recovery against the carrier for injuries he may sustain by the carrier's negligence.* A person with such meagre rights would not be regarded in law as a passenger.

Counsel puts the case of a private contract with a bridge builder to repair a bridge on a railway, coupled with an agreement to transport the workmen in a baggage car without charge. He says, as soon as such persons board the train, the relation of passenger and carrier would thereby be established. That might be so, but it does not represent the present case because the bridge builder does not, in the case supposed, agree to indemnify the railroad company against any claim of his men; nor do the men agree to reimburse the bridge builder for any damages he may have to pay on account of their claim against the railway compay.

Counsel for defendant in error, at page 39 of his brief, referring to our statement in the original brief that in the cases cited by the learned Circuit Court to support the proposition that the express messenger was a passenger, mentions five cases in which he claims the express messenger was a party to or cognizant of the exemption contract between the railroad and express. But a careful examination of these cases shows our original statement to be correct. They are reviewed in our brief, at pages 35, 36, 38, 39 and 40.

Respectfully submitted,

EDWARD COLSTON,
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JUDSON HARMON,
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CINCINNATI, *November* 9, 1899.

No. 88.

FILED
DEC 27 1899
JAMES H. McKENNEY,
Clerk.

The Robert Clarke Company, Cincinnati. December, 1899.

Reply Brf. of Colston for P. E.
Filed Dec. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Baltimore and Ohio Southwestern Railway Company,

Plaintiff in Error,

No. 88. *vs.*

William Voigt,

Defendant in Error.

BRIEF IN REPLY TO POINTS MADE BY COUNSEL FOR DEFENDANT IN ERROR IN ORAL ARGUMENT.

EDWARD COLSTON,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Baltimore and Ohio Southwestern Railway Company,

Plaintiff in Error,

No. 88. *vs.*

William Voigt,

Defendant in Error.

BRIEF IN REPLY TO POINTS MADE BY COUNSEL FOR DEFENDANT IN ERROR IN ORAL ARGUMENT.

I.

Upon reaching my office to-day, returning from Washington, I discovered that the case of *Blank* v. *Illinois Central Railway Co.*, cited in my first brief (that having a white cover) at p. 9, the opinion being printed in full as an appendix to that brief, has been affirmed by the Supreme Court of Illinois, the opinion appearing in full in Vol. 55 Northeastern Reporter, No. 5, p. 332. The opinion has not been elsewhere printed, and to afford the court convenient access to it, it is reproduced here. The court said :

"The main question in the case concerns the validity and legal effect of plaintiff's contract. The ground of attack upon the contract is that it is void as against public policy. It is first argued that it is a contract of employment between the plaintiff and the express company, which is contrary to public policy, as exempting the employer from the consequences of its negligence. It is insisted that an employer cannot stipulate for immunity against his own negligence, and that a contract intended to have that effect is void, as tending to relax the employer's care, and to increase the perils of the occupation. The question thus sought to be raised has no relation to this case since the contract is not sought to be enforced for the the purpose of relieving plaintiff's employer, the express company, from the consequences of its negligence, or affording it immunity for its wrongful act. It is not alleged or claimed by any one that the employer was in fault, or neglected any duty towards the plaintiff. The question is whether the defendant had a right, in taking the express company and its business and employes upon its road, to make the contract that it should not be liable for the negligence of its employes. It is insisted that the plaintiff occupied the position of a passenger for hire, and that public policy will not permit a contract to be made releasing a carrier from liability to a passenger for its negligence."

After having thus stated the question, the court proceeds in delivering its opinion, as follows:

"Each of the parties is a common carrier for the public, and the railroad company is not bound to furnish facilities to every express company that applies for carrying on its business on its road. It is not charged with the duty of carrying express companies at all, *and is, therefore, entitled to make a special contract establishing the duty and liability of the railroad on its side, and of the express company on the other.*" (Italics ours.) "The Supreme Court of the United

States so held in the Express Cases, 117 U. S. 1, and pointed out the reasons why special contracts in reference to such business are necessary. A railroad company takes an express company on its road by virtue of a special contract, in which the rights and duties of the parties are defined in such manner as, in the opinion of the parties, will be most suitable or beneficial to them. Such a contract gives to the express company rights superior to other express companies and to the general public, which it has no right to demand, and which the railroad company is under no obligation to furnish except upon terms agreeable to it. In this instance such a contract was made, by virtue of which the express company's goods and the plaintiff, as its employe, were upon the car, carrying on the business of the express company as a common carrier. Plaintiff was being carried for the sole purpose of handling and caring for the express company's goods, which were being carried under the terms of the special contract, and which the defendant was not otherwise bound to carry at all. The question whether, under such circumstances, a contract relieving the carrier from liability for negligence merely is valid, has several times been considered."

The court then refers to the cases that we have heretofore cited—*Bates* v. *Railroad Co.*, 147 Mass. 255; *Railroad Co.* v. *Keefer*, 146 Ind. 21; *Railroad Co.* v. *Mahoney*, 148 Mass., and then proceeds as follows:

"The contract gave the express company, and plaintiff, as its messenger, rights which defendant, as a common carrier, could not have been compelled to grant; and in such a case the carrier may contract as a private carrier, and require exemption against liability for negligence as a condition of granting such rights. An agreement to take and carry property in such a case, under such conditions as the parties agreed upon, is held not to be against public policy. As against these decisions we are not referred to any de-

cision of a court of last resort, and the only opinion to the contrary cited by counsel is one by Judge Taft, passing upon a demurrer to an answer in a trial court (that is this case). In that opinion the judge expressly disapproves of the decisions of the Supreme Court of Indiana and reaches the opposite conclusion by the following course of reasoning."

The court then states the reasoning of the learned circuit judge in passing upon the demurrer in this case, pretty much as has been already stated to this court, and then says:

> "We do not see how it could follow that because a person who is an express messenger might be a passenger in a passenger car is also a passenger while doing his employer's business in the express car. The reasoning of the other courts seems to us the sounder and better. An attempt is made to liken this case to the case where a person is carried with his stock of goods and where he is regarded as a passenger. There are many such cases where the carrier is bound to receive and carry goods or stock, and where by general usage, or by the rules of a company, the owner or his agent may go, or is required to go, in the charge of the property. In such case the owner is entitled to demand the carriage of his property as a part of the duty of the railroad company towards the public as a common carrier, under the conditions fixed by the law. The railroad company is bound to receive and to carry for anybody who shall appear, and by the rules or usage of the company the charge for carrying the stock includes the carrying of the person in charge. Such a person is a passenger. But the difference in the relation between such a case and this is apparent. . . . The judgment of the Appellate Court is affirmed."

Magruder, J., dissented and concurred in the opinion of Judge Taft on the demurrer.

II.

CASES CITED BY COUNSEL FOR DEFENDANT IN ERROR INTENDED TO SHOW THAT BECAUSE THE RAILWAY COMPANY HAULED THE EXPRESS CAR IN A PASSENGER TRAIN THEREBY IT BECAME A PASSENGER CARRIER OF THE EXPRESS MESSENGER.

Hannibal Railroad v. *Swift*, 12 Wall. 262, is the first case cited by our opponent for the above purpose; that case, as we submit, proves nothing. In the early stages of the civil war a portion of the garrison at Ft. Randall, Dakota, was to be moved thence to Cincinnati. When the soldiers and officers, with their baggage and camp equipage, reached the city of St. Joseph, on the western limit of the State of Missouri, it was found that the railroad running thence to Hannibal, on the eastern limit of the state, was beset by bands of armed men, and that many trains had been attacked and destroyed on the line. For that reason, and for that reason only, the railroad company was unwilling to fix any price to be charged for the carriage of the soldiers, their baggage and equipage, until the train should have safely reached its destination, Hannibal. At the city of St. Joseph, the officer in command of the soldiers went to the yards of the railroad company and selected a stout car into which, with the consent of the railroad company, he caused to be loaded the baggage and camp equipage of the soldiers and officers, and put a squad of soldiers with their guns in charge of the car to protect it from the depredation of the armed bands. This car containing this baggage and camp equipage was put into the passenger train, and the officers and soldiers were carried in the passenger coaches of the same train. On the journey the coach containing the equipage and baggage took fire and the baggage was destroyed. The action was brought by Dr. Swift, surgeon in the United States Army, who was one of

the command moving as aforesaid from Ft. Randall to Cincinnati, to recover the value of his baggage which was lost in the above-mentioned fire.

The question was whether the railway company under the circumstances had received the baggage as a common carrier and was liable as such therefor? This court held that it was liable, and that it had received the baggage as a common carrier. The railroad company, it should be observed, on arrival of the train at Hannibal, accepted compensation for the carriage of the soldiers and their baggage and their camp equipage. The reasons for the decision are obvious and distinguish that case from the one now under consideration. These reasons are (1) the railroad company was a common carrier of the persons and of their baggage; (2) the railroad company recognizing this to be its duty as a common carrier, on demand of the commanding officer, "furnished transportation for the troops, their baggage, camp equipments, arms, munitions of war, and the chattels of himself as well as those of the plaintiff" (see Finding of Facts, p. 263); (3) the railroad company made no attempt to limit its liability for the safe carriage of the car and contents; (4) the only reason why the military baggage and trappings were not put into the ordinary baggage car was the disturbed condition of the country, rendering the services of an armed guard necessary, not generally, but only for that particular occasion; (5) the railroad company was in the performance of a duty which it was bound by law to perform. While in the present case it is admitted by counsel for defendant in error that the railway company was under no obligation except by reason of its contract. (See his first brief, p. 4 and p. 37.)

In *Hannibal Railroad Co.* v. *Swift*, Justice Field, speaking for the court, of the duty of the railroad company to transport the soldiers and their baggage and camp equipage, used this language:

> "Its obligations and liabilities in these respects were not dependent upon a contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract." (See p. 270. See also observations of the court, pp. 271, 272.)

Mallory v. *Tioga Railroad Co.*, 39 Barbour, 488, is also cited by counsel for defendant in error. It is obvious that that case has no application. The railway company was hauling cars of the plaintiff, a miner, loaded with his coal. The act of Pennsylvania, under which the railway company was incorporated, required it to haul coal or other commodities in cars of the shippers; so that the railway company was performing in that case a service which by law it was obliged to perform. The action in the case was for coal lost in course of carriage by negligence of the railway company. The court made the following pertinent observations:

> "It is apparent from this statement not only that the carriage of loaded cars belonging to others over the defendants' road for hire, was a part of the business expressly authorized by the act of their incorporation, and provided for by their agreement with the Corning and Blossburgh Company, but that they had been engaged in thus transporting cars for the plaintiff during several months prior to their undertaking to carry the train in question.
>
> But independently of the special provisions of the act of incorporation and the agreement above referred to, I am of the opinion that the defendants' undertaking was in the line of their general business." (See pp. 491, 492.)

And again the court said:

> "Yet if, as is claimed by them" (the railway company), "they simply entered into a special engagement outside of their general business, to provide the plain-

tiff with sufficient motive power to draw his cars over their road, under the care and control of his servants, they did not thereby assume the obligations of carriers. But the case proved is, in my judgment, materially different from the one thus hypothetically stated."

The one hypothetically stated, it is to be observed, is our case.

Lackawanna and Bloomsburg Railroad Co. v. *Chenewith*, 54 Pa. St. 382, is also cited by defendant in error, but it is clearly distinguishable from this case. There Chenewith, by urgent solicitation of the operatives of a passenger train on the railway, got them to attach his market car to the passenger train, he agreeing "to run all risk." Chenewith, while standing on the platform of a passenger car of the train, *and not on his own car*, was thrown off, and sustained injuries for which suit was brought. His being thrown off was caused by the engine running against a cow on the track. The court held that his agreeing "to run all risk" only meant that he should run all risks occasioned by his car being attached to the passenger train, and that the accident was not such risk.

III.

COUNSEL FOR DEFENDANT IN ERROR SEEMS FINALLY TO FALL BACK UPON AN ALLEGED PROPOSITION THAT NO PERSON CAN LAWFULLY ENTER INTO A CONTRACT TO RELIEVE HIMSELF FROM LIABILITY FOR INJURY OCCASIONED A THIRD PERSON BY THE NEGLIGENT ACT OR OMISSION OF A SERVANT OR AGENT.

It becomes of consequence, therefore, to ascertain whether there is such rule. Counsel has cited a number of cases which are claimed to support it. Most of them are cases in which the contract to procure exemption from neg-

ligence was admitted to be made with a passenger for hire. The others are cases similar to *Railroad Co.* v. *Spangler*, 44 Ohio St. 471, and rest upon the grounds upon which that case rests. That case is one of a class holding that where the policy of the law has established the rule that a common carrier is libale to its employes for the negligence of certain other of its employes—for example, in Ohio, those placed in authority over the injured employe—it is not competent for the company to relieve itself, for the reason that such special liability is not imposed for the benefit of the individual employe nor for the benefit of all the employes, but is imposed for the protection and benefit of the public who have occasion to deal with corporations. In *Railway* v. *Spangler*, the Supreme Court hold:

> "The policy of our law being well settled, it only remains for us to inquire whether railroad companies may ignore or contravene that policy by private compact with their employes, stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to mere private interests and agreements." (See p. 479.)

The public policy spoken of in the above quotation is that public policy which prohibits a common carrier from relieving itself by contract from liability for its own negligence. If there were a general principle of law such as is claimed by opposing counsel, the courts would not be found confining the incompetency to make such contracts to that class of persons engaged in public employment, to wit: common carriers and the like, but would have laid

down the proposition as being of general application to all persons howsoever engaged.

Further, if any such rule of law claimed by counsel for defendant in error exist, the judgment of this court in *Hart* v. *Pennsylvania Railroad Company*, 112 U. S. 331, is manifestly wrong; for in that case the carrier was allowed by stipulation to limit his liability to an agreed valuation for loss of a horse shipped over the road, the rate of compensation being based upon the agreed valuation. From the report of the case it is manifest that it was admitted that the loss of the animal was due to negligence. If such general rule of law has existence, as is claimed by counsel on the other side, the cases of *Coope* v. *Wabash, etc. Ry. Co.*, 56 Mich. 111; *Chicago, etc. Ry. Co.* v. *Wallace*, 66 Fed. Rep. 509; *Robinson* v. *Old Colony R. R. Co.*, 156 Mass. 525; *Bates* v. *Old Colony R. R. Co.*, 147 Mass. 255; *Hosmer* v. *Old Colony R. R. Co.*, 156 Mass. 506; *Louisville, etc. Ry. Co.* v. *Kiefer*, 146 Ind. 21; *P. C., etc. Ry. Co.* v. *Mahoney*, 148 Ind. 196 (cited in former briefs in this case), and *Blank* v. *Illinois Cen. R. R. Co.*, 55 N. E. Rep. 332, were all wrongly decided.

This right to stipulate against liability for negligence of servants and agents was decided in the case of *Hartford Insurance Company* v. *Chicago, Wilwaukee & St. Paul Ry. Co.*, 70 Fed. Rep. 201 (cited page 17 of our first brief), where it was held that a stipulation in the lease by a railroad company of a part of its right of way, whereby the lessee agrees that the railroad company should not be liable for injury to or destruction of any property placed upon such portion of the right of way, whether the same was caused by negligence or not, was valid. That case has been recently affirmed by this court in an opinion delivered by Mr. Justice Gray, November 6, 1899.

While it is not in the power of persons who enter into a contract that necessarily contemplates a violation of law to thereafter claim release from responsibility by virtue of such

contract, yet a principal may, in many cases, and this is one of them, be protected against the negligent acts and omissions of agents and employes in respect of matters which can only be performed by the principals through the instrumentality of employes.

It is well said in the case of *Quimby* v. *Boston & Maine R. R.*, 150 Mass. 371:

> "It is well known, with all the care that can be exercised in the selection of servants for the management of the various appliances of a railroad train, accidents will sometimes occur from momentary carelessness or inattention."

A more extended discussion of the subject of public policy will be found in our first brief, pages 14 to 19.

The only cases which opposing counsel is able to find that seem to sustain the proposition he makes are *Johnson, Adm'r*, v. *R. R. Co.*, 86 Va. 975, and *Roesner* v. *Hermann*, 8 Fed. Rep. 782. It is sufficient to say of these cases that they do not represent the law. See p. 4 (bottom) of opinion of Mr. Justice Gray in *Hartford Fire Insurance Co.* v. *The Chicago, Milwaukee & St. Paul Railway Co.*

Respectfully submitted,

EDWARD COLSTON,

Attorney for Plaintiff in Error.

December 22, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1898.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,

Plaintiff in Error,

No. 314. *vs.*

WILLIAM VOIGT,

Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief for Defendant in Error.

STATEMENT OF CASE.

This action was originally brought by William Voigt, an express messenger of the United States Express Company, to recover damages from the Baltimore & Ohio Southwestern Railway Company for injuries inflicted on him while traveling on its railroad in the course of his business as express messenger. The injuries were caused in a collision on defendant's road near Coal City, Ohio, which collision, it is admitted, resulted from the negligence of the plaintiff in error, defendant below.

The railroad company filed its answer, the second paragraph of which set up two contracts, one of which existed

between the express company and the railroad company, whereby the former agreed to protect and save harmless the latter from claims on account of injury to the messengers of the express company, and the other a contract between the express company and defendant in error, as one of its messengers, whereby he agreed that he would relea e the railroad company from any liability for injuries that might be inflicted upon him by the negligence of the railroad company, its servants, agents or employes, or otherwise.

To this second defense a demurrer was interposed; the demurrer was sustained, and the case came on proceedings in error into the Circuit Court of Appeals for the Sixth Circuit, plaintiff in error alleging that the Court below erred in sustaining the demurrer. The opinion of the Court below sustaining the demurrer is reported in 79 Fed., 561.

Thereafter the case came on for hearing and a question of law therein arising was certified by said Circuit Court of Appeals to the Supreme Court of the United States for its instruction. The question is set out in full in the printed certificate filed in this case and is summed up by the Court as follows:

"Does said railroad company assume towards such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of the employes of railroad company?"

ARGUMENT.

I.

We contend that the plaintiff was entitled to all the rights of a passenger for hire of a common carrier; that among these was the right to be carried under the protection of the law imposing upon the carrier the duty of exercising a high degree of care and diligence; that the law forbids the carrier to exempt itself by contract from the obligation of this imposed duty; that in the Federal courts and in Ohio, where this contract was made, no contract stipulating for such exemption is upheld, and what is not permitted to be done directly may not be accomplished by indirection.

The proposition that the rights of an express messenger are those of an ordinary passenger for hire of a common carrier is supported by an almost unanimous consensus of authority.

Fordyce v. *Jackson*,, 56 Ark., 594.
Yeomans v. *Co.*, 44 Cal., 71.
Woodworth v. *Co.*, 26 O. S., 585.
Blair v. *Co.*, 66 N. Y., 313.
Brewer v. *Co.*, 124 N. Y., 59.
Kenney v. *Ry. Co.*, 125 N. Y., 422.
Chamberlain v. *Co.*, 11 Wis., 248.
Chamberlain v. *Pierson*, 87 Fed., 420.
Jennings v. *Co.*, 15 Ont. App., 477.
Thomas v. *Co.*, 79 Ky., 160.
Jones v. *Co.*, 125 Mo., 666.
R. R. Co. v. *Wilson*, 79 Tex., 371.
Hutchinson, Carriers, §§ 564 and 565.
Ray, Imposed Duties, Passengers, Carriers, 9.
Am. & Eng. Ency. Law, 512.

All of these cases hold that an express messenger, though sometimes carried in a special car, is a passenger, and, inasmuch as his carriage is provided for in the price paid for carriage of the express matter, he is not a free passenger,

but a passenger whose passage money has been paid—a passenger for hire of a public or common carrier.

The relations of a postal or mail clerk to the railroad company which carries him with the mail matter present an analogy to those of an express messenger, which has not escaped the notice of courts or of text-book writers. Both are passengers whose carriage is merely incidental to the transportation of parcels or valuable merchandise of which they have charge. They travel alike in a special car or a part of a car furnished and set apart for this business by the carrier. Sometimes they occupy merely different parts of the same car. They are both employes of public carriers, whose right to send property over the line is secured by private contract. Much of the matter carried by one could, in the ordinary course of business, be carried by the other. One of these public carriers enjoys a monopoly over the letter mail, the other a practical monopoly over parcels, packages or paper sent "C. O. D.," the postal service here not embracing, as it does abroad, collection of charges on articles sent by mail.

Both the postal clerk and the express messenger derive their right to ride on the train, in so far as payment of their passage money is concerned, from the contract by which the railroad company carries the goods. The express company's contract stipulates that no extra charge shall be made for the messenger. The law provides that the contract price for carrying the mail shall include the right of the postal clerk to travel with the mail without extra charge. In neither case is the contract one which the railroad company is obliged to make. In both cases the contract with the railway company is silent as to any release of liability by the postal clerk or the express messenger, although the railway company, as to liability for the latter, is guarded by an indemnity from the express company. The express

messenger or messengers and the postal clerk or clerks constitute a special class of passengers for hire, for whose accommodation and safety the carrier is bound to be diligent to provide. They lose none of the rights of an ordinary passenger for hire, but they constitute a separate or special class of passengers, precisely as drovers riding with cattle on freight trains, where the carrier is not bound to carry passengers, are, in the Federal Courts at least, a class of passengers for hire, subjected to peculiar dangers, but entitled to a care on the part of the carrier that, in the words of the Supreme Court in the Lockwood case, 17 Wall., 357, and the Horst case, 93 U. S., 291, is measured by the highest degree of human skill and foresight.

There is an unbroken current of authority to the effect that a postal clerk is a passenger for hire.

Arrowsmith v. *Co.*, 57 Fed., 165.
Gleeson v. *Co.*, 140 U. S., 435.
Seybolt v. *Co.*, 95 N. Y., 562.
Nolton v. *Co.*, 15 N. Y., 444.
Magoffin v. *Co.*, 102 Mo., 540.
Mellor v. *Co.*, 105 Mo., 455–460.
Jones v. *Ry. Co.*, 125 Mo., 666.
Hammond v. *Co.*, 6 S. C., 130.
Hale v. *Grand Trunk Co.*, 60 Vt., 605.
Libby v. *Co.*, 85 Me., 34.
Kingman v. *Co.*, Ky., 35 S. W., 264.
Ry. Co. v. *Wiley*, 72 Md., 36.
Gulf Ry. Co. v. *Wilson*, 79 Tex., 371.
Ketcham v. *Co.*, 133 Ind., 346.
Ry. Co. v. *Shott*, 92 Va., 34.
Collett v. *Co.*, 16 Adolph & E. N. S., 984.

In the case of *Yeomans* v. *Steamship Company*, 44 Cal., 71, it was held:

"That if an express company hires its freight transported on a steamer or railroad of a company engaged in transporting freight and passengers for hire as common carriers, and hires an agent to take charge of such freight whose passage is paid for in the contract, such agent occupies the *position of an ordinary passenger* as to the liability of the

common carrier for injuries he may sustain caused by the negligence of its employes."

In the case of *Kenney* v. *R. R. Co.*, 125 N. Y., 422, the action was brought to recover for death caused by the negligence of defendant while decedent was traveling as express messenger. It was contended by the railroad company that all its relations to decedent were governed by its contract with the express company, but the Court treated the messenger as the passenger for hire of a common carrier, and held that the contract would not operate to release the railroad company from liability for negligence.

The contract in question was expressed in the following words, p. 424:

"Party of the first part (the railroad company) is hereby expressly released from and guaranteed against any liability for any damage done to the agents of the party of the second part, whether in their employ as messengers or otherwise."

The Court say, p. 426:

"This clause may be read not necessarily as releasing or preventing an action by employes of the express company against the railroad company for damages for injuries received while on the road, but as an agreement to indemnify the railroad company in the event of such action. That would be a perfectly proper agreement for the parties to make."

In the case of *Brewer* v. *R. R. Co.*, 124 N. Y., 59, also the case of an express messenger, the Court say, p. 64:

"The negligence of the defendant was the violation of its duty; it was the want of the care to which plaintiff's intestate was entitled for his protection. This duty and this right did not depend upon or rest upon the contract, but upon the relation as carrier of the plaintiff and the care which the defendant as such, was required to exercise. * * * The contract between the companies did not relieve the defendant from its duty to exercise due care for the protection of the messenger, nor did the defendant take from it any right to disregard such duty. Whatever right

to relief from the consequences of its negligence in that respect the defendant derived from the contract arose by way of indemnity upon the stipulations of the express company. The deceased was a passenger and therefore the refusal of the Court to charge to the contrary was no error. The location of the express car in the train did not deny him the benefit of that relation."

In the cases of *Bates* v. *R. R. Co.*, 147 Mass., 255, and *Hosmer* v. *R. R. Co.*, 156 Mass., p. 506, the express messenger was held to be a passenger for hire of a common carrier, but as the privilege of riding free in the baggage car was one which the company was not required to grant, it was held on the authority of *Quimby* v. *R. R. Co.*, 150 Mass., 365, in which case one who was riding on a *free pass* was held bound by the stipulation of release, that the carrier had the right to attach to the grant of such *free* privilege a stipulation for exemption from the consequences of its negligence or that of its agents.

In the case of *Commonwealth* v. *R. R. Co.*, 108 Mass., 7, a railroad company, in consideration of the payment to them by a person of a certain sum of money per year in quarterly installments, and of his agreement to supply the passengers on any one of any of their regular trains with ice water, issued season tickets to him quarterly for his passage on any one of their regular trains and permitted him to sell popcorn on all their trains. It was held that his relation to the company while traveling on the railroad, under this contract, was that of a passenger for hire, and that no conditions printed upon the back of the ticket could have the effect to relieve defendants from their legal liability for gross negligence and carelessness. On page 11 the Court say:

"It appears to us that under this state of facts he must be considered a passenger. It certainly can make no difference that his object in traveling was to sell his merchandise while in the act of traveling and that he had no other purpose in going over the road. Like other season ticket hold-

ers he paid the defendants for the privilege of passing and repassing regularly over the road and was at liberty to go or not, as he pleased. * * * He was traveling on his own business and not on that of the defendants."

In *Jones* v. *Co.*, 125 Mo., 666, the Court say, p. 675:

"Plaintiff was transported over defendant's road under a contract which was supported by a sufficient consideration, and he was entitled to the rights of a passenger in respect of the careful running and management of the train. The rights of plaintiff and the obligations of the defendant to him under this contract do not differ materially in these respects from those which are implied under contracts between a transportation company and the Government, by which the former agrees to carry the agents who have charge of the mails, or *under contracts with express companies to transport their agents, who* are in charge of their business, or with shippers of live stock to carry the persons in charge of the stock. Under these contracts the persons carried are uniformly held entitled to the protection of passengers. * * * It is settled law in this state that a carrier can not by contract stipulate against its own negligence. This rule in its application to the carriage of passengers has never been relaxed."

In the case of *Railway* v. *Ketcham*, 133 Ind., 346, the Court say, p. 350, in answer to the proposition that a postal clerk was not a passenger:

"It may be pertinent to inquire what relation the appellee bore the appellant if not that of a passenger. Having, as we think, a lawful right in the train he certainly is not an intruder or a trespasser. * * * He is not employed by the appellant. * * * He is, in our opinion, a passenger, having the same rights in relation to the recovery of damages for an injury sustained on account of the negligence of the railway company as *any other passenger*. The fact that he may ride in a postal car can make no difference with his right of recovery of damages for an injury sustained by reason of a collision resulting from the negligence of the railway company. The postal car, the smoking car, the ladies' car and the parlor car, they all constitute one train and are upon the train for the purpose of carrying passengers. * * * The liability of the railway

company to a passenger for damages resulting from the negligence of its employes is the same whether he be in one car or another, so he has a lawful right to be in the car he occupies.

"A complete, and we think a legitimate, answer to the proposition that the passenger would not have been injured had he been in another car than that in which he was riding at the time of the injury is, that he would not have been injured at all had it not been for the negligence of the railway employes which caused the collision.

"We think, independent of any statute, the current of authority is almost unanimous to the effect that mail agents occupy the same relation to the company as any other passenger."

In the case of *Jennings* v. *R. R. Co.*, 15 Ont. App., 477, the action was for negligence in causing death of an express messenger. The Court say, p. 483:

"He was lawfully on their train *as a passenger*, either with their assent or under some agreement, express or implied, between them and the express company, and the duty was thereby cast upon the railway company to carry him safely."

In *Ry. Co.* v. *Wilson*, 79 Texas, 371, the Court said:

"We are of opinion that essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in the employment, whether this be by contract between them or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, *express agents* or messengers and others having duties to their employers to perform which can be performed only by such persons traveling on railway trains or other public conveyances.

"Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the car or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person, is a matter of no importance.

"It is enough that he is lawfully on the car and entitled

to transportation to give to him the character of passenger and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part.

"If there be necessarily more danger in traveling in the coach prepared and used for the transportation of mail, even when due care is used, than in traveling in the coaches prepared and used for transportation of ordinary passengers, then it may be held that a mail agent assumes the risk of danger necessarily thus arising from the position of the mail car in the train, but he does not assume any risk of danger that may result from the negligence of the carrier or its servants.

"The charge which sought to relieve appellant from liability because appellee was in the mail car instead of a car prepared and used for ordinary passengers was properly refused in this case, because appellee was in the mail car, the very place where appellant intended he should be and where his duty called him.

"The contract by virtue of which he became entitled to transportation was made with reference to his transportation in that car, and if appellant or its servants failed to use that degree of care prescribed by the charge of the Court for his safety, then the appellant was liable.

"This is not a case in which a passenger was injured because he placed himself uninvited in a car in which the carrier did not intend he should travel, when with safety he would have been carried in the car intended for him."

In the case of *Arrowsmith* v. *Ry. Co.*, 57 Fed. Rep., 165, which was an action for negligence causing the death of a postal clerk, the Court say, p. 167:

"We shall treat the deceased in all respects as a passenger for hire. The railroad company having contracted for the carriage of the U. S. mail over this line, contracted at the same time safely to carry the mail clerks having custody thereof. The compensation for the carriage of such clerks must be regarded as included in the compensation paid by the Government for the carriage of its mails. It is immaterial who pays the compensation for the carriage of such passenger. The legal relation of passenger and carrier must be taken to have existed at the time of his injury between the deceased and the railroad company with whom the contract for his carriage had been made by the Government."

The case of *Chamberlain* v. *Pierson*, 87 Fed., 420, was a case in which an express messenger was injured by negligence of the railroad company, which set up in an action by him to recover, the fact that he was traveling under a contract which gave him transportation at his own risk. The Court say, p. 421:

"If it be conceded, as claimed by the railroad company, that the contract between it and the express company accorded the plaintiff free transportation at his own risk, yet it is well established that such a contract will not relieve the railroad from responsibility for an injury resulting from the negligence of its agents. One of the earliest decisions of the Supreme Court on this question is *Railroad Co.* v. *Derby*, 14 How., 467. In this case the plaintiff was president of another company, and a stockholder in the road on which he was riding. He was on the road by invitation of the president of the company—not in the usual passenger cars, but on a small locomotive car used for the convenience of the officers of the company, and paid no fare for his transportation. The Court said: 'The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between parties, nor affected by any social relation, or otherwise, which they bore to each other.'

"*Railroad Co.* v. *Lockwood*, 17 Wall., 357, is a leading case on this subject. The Court here held: '(1) That a common carrier can not lawfully stipulate for exemption from responsibility, when such exemption is not just in the eye of the law. (2) That it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter. (4) That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.'

"In *Waterbury* v. *Railroad Co.*, 17 Fed., 671, the doctrine is thus stated (syllabus): 'The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for neg-

ligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a matter of favor to him.'

"The principles recognized in the cases we have cited, and in numerous other decisions, were correctly applied by the judge who presided in the court below. The plaintiff, Pierson, as an express messenger, was rightfully on the train of the defendant, in the performance of duties which the railroad company had, by its contract with the express company, agreed that he should perform, and which, the contract states, were 'for the mutual benefit and account of the parties thereto.'"

The case of *Gleeson* v. *Virginia Midland Ry. Co.*, 140 U. S., 435, was an action brought by Gleeson, a postal clerk, against the railway company on whose line he was employed as route agent, for an injury sustained by him while riding in the mail car by the derailment of the train caused by the fall of earth upon the track from the steep sides of a cut through which the line passed.

The Court held that Gleeson, as a passenger, had the right to rely on the mere occurrence of the accident as proof of negligence, and proceeded throughout the decision upon the theory that he was a passenger for hire of a public or common carrier.

That the status of the postal clerk as a passenger is derived from his relation to the common carrier as one carried by it for hire, and not from the statute of the United States, which provides, Rev. Stat., § 4000—

"Every railroad company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon with the person in charge of the same,"

was determined in the case of *Ry. Co.* v. *Price*, 113 U. S., 218, in which case Price, a postal clerk, sought to avoid the effect of a decision of the Supreme Court of Pennsylvania, which had held, construing a statute of Pennsylvania, that as a postal clerk he was not a passenger, by claiming in the Supreme Court of the United States that his right to be on

the train and his status there as a passenger were fixed by the United States statute above quoted.

The Supreme Court denied his claim and said, p. 221:

"We do not think these provisions, *i. e.*, of the U. S. statutes, either aid or govern the construction or proviso in the Pennsylvania statute. The person thus to be carried with the mail matter, without extra charge, is no more a passenger because he is in charge of the mail nor because no other compensation is made for his transportation than if he had no such charge, nor does the fact that he is in the employment of the United States, and that defendant is bound by contract with the Government to carry him, affect the question. It would be just the same if the company had contracted with *any other person who had charge of freight on the train to carry him without additional compensation.* The statutes of the United States which authorize this employment and direct this service do not therefore make the person so engaged a passenger, or deprive him of that character in construing the Pennsylvania statute. Nor does it give to persons so employed any right as against the railroad company *which would not belong to any other person in a similar employment by others than the United States.* We are therefore of opinion that no question of federal authority was involved."

In *A. G. S. R. R. Co.* v. *U. S.*, 25 Ct. of Cl., 30, it was said to be well settled that a railroad company, not a "land grant" road, can not be required by the Government to enter into a contract to carry the mails.

The right of the Government, therefore, to use the railroads to transport the mails and postal clerks is as much a matter of private contract as is the right of the express company to use the railroads to transport express matter and messengers.

The Court in the Gleeson case, 140 U. S., 435, by holding the railway company to the highest degree of care and foresight determined that the relation of the railway company to a postal clerk was that of a public or common carrier of passengers and not that of a private carrier. A private carrier of passengers is "not subject to any such stringent

obligations and responsibilities." *Shoemaker* v *Kingsbury*, 12 Wall., 369.

That a postal clerk's status or footing as a passenger, or the character of his relations to the carrier is in no wise different from that of an express messenger and does not depend upon any act of Congress, is shown by the decision of the Supreme Court in *Price* v. *Ry. Co.*, quoted above.

The contention of plaintiff in error therefore resolves itself into the single proposition that the relation of an express messenger to the railroad company as the passenger for hire of a public or common carrier is changed by his entering into a contract releasing the railroad company from liability for negligence.

We think the mere statement of the proposition carries its own refutation with it. As was said in the case of *R. R.* v. *Lockwood*, 17 Wall, at page 376:

"It is argued that a common carrier by entering into a special contract with a party for the carriage of goods or persons on modified terms drops his character and therefore may make any contract he pleases—that is, he may make any contract whatever, because he is an ordinary bailee, and is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning.

And on page 383:

"In the case before us the law fixes the degree of care and diligence due from the railroad company to persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care or diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

It should also be remarked that the contract for carrying the mails and the contract for carrying the express matter

are equally silent as to any release or stipulation for exemption to be entered into by either the postal clerk *or the express messenger.*

In the contract for carrying the express messenger the railroad company does not disclaim liability as a common carrier for negligently injuring him; on the contrary, it anticipates and provides for such liability by requiring the express company to indemnify it against precisely such liability. This it may do just as it may effect any other insurance, and, presumably, as a premium for such insurance the sum paid by the express company for services and facilities is *pro tanto* less. Nor as was said in the case of *Phenix Ins. Co.*, 129 U. S., 397; 117 U. S.,.312, this contract for insurance does not contravene public policy, for it is not a contract for exemption from liability for negligence, but a contract to provide funds to meet such a liability. Now as is shown in *Seybolt* v. *Ry. Co.*, 95 N. Y., 562, an attempt on the part of the railroad company after the right of the postal clerk to ride became fixed by the contract and his status as a passenger thereupon became fixed by the rules of law, to procure a release from liability for negligence, is nugatory and void. It follows that a similar attempt by the railway company after the right of the express messenger to ride on the train had been secured and paid for, and his status as a passenger became fixed by law, would be equally nugatory. And if the railroad company could not itself require such a contract or enforce it when made, it could not procure it to be made by any agent for it or with a third party for its benefit, for if it is itself forbidden by the policy of the law to make such a contract it can not avail itself of such a contract made for its benefit.

In this case it is not contended by counsel, that if the contract between the express company and the railroad company had contained no provision whatever as to liability of the railroad company for wrongfully killing or in-

juring the express messenger, that the right of action would not exist, or that the express messenger would not be a passenger for hire. Nor could it be maintained that if the railroad company had thereupon contracted with an insurance company or the express company itself for indemnity against such liability that the express messenger, even if that fact were known to him, would be held to have lost his right of action, or that his status as a passenger for hire would be affected. Now, however, the express company, not at the instance nor for the protection of the railroad company, nor in pursuance of any of the terms of the contract under which the railroad company agrees to and does carry the express freight and messengers, but solely to reduce to a minimum its own liability on its contract of insurance or indemnity, procures the signature of the express messenger to a contract exempting the railroad company from liability for its negligence. It is the same as if one having a pecuniary interest in the railway company should require his traveling salesman to release the railway company as a condition of his employment.

II.

Even if the express company's contract with the railroad company were treated as a private contract, the express messenger, whose right to ride on the train was thereby secured, would none the less sustain to the railroad company the relation of passenger for hire to a common carrier.

In the case of *R. R. Co.* v. *Stevens*, 95 U. S., 655, the plaintiff being the owner of a patented car coupling, was negotiating with the defendant at Portland, Maine, for its adoption and use by the latter, and was requested by the defendant to go to Montreal to see the superintendent of its car department. It is perfectly clear that this was a private contract, into which the railroad company could not

be compelled to enter. The plaintiff consented to go, and was furnished with a pass to carry him in the defendant's cars. This pass was in the usual form of free passes. It bore the following printed endorsement:

"The person accepting this free ticket, in consideration thereof assumes all risks of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person of the passenger using this ticket."

The Court say, p. 658:

"It is evident that the Court below regarded this case as one of carriage for hire and not as one of gratuitous carriage, and hence, under the ruling of this Court in *R. R. Co.* v. *Lockwood*, 17 Wall., 357, it was a case in which the defendant, as a carrier of passengers, could not lawfully stipulate for exemption from liability for the negligence of its servants. In taking this view we think the Court was correct. The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, is not a matter of charity or of gratuity in any sense. It was by virtue of an agreement in which the mutual interest of the parties was consulted. The pass was a mere ticket, and no evidence of any contract by which the plaintiff was to assume all the risk, and *it would not have been valid if it had been.* * * * The Court rightly refused, therefore, to charge that the plaintiff was traveling on the conditions endorsed on the pass, or that if he traveled on that pass, the defendant was free from liability. * * * It is strongly urged, however, that the plaintiff's acceptance of the pass should be regarded as competent evidence that such a pass was in the contemplation of the parties when the arrangements as to his going into Montreal were made. But we have already shown that the carrying of the plaintiff into Montreal was not a mere gratuity. To call it such would be repugnant to the essential character of the whole transaction. There was a consideration for it, both good and valuable. It necessarily follows, therefore, that it was a carrying for hire. Being such, it was not competent for the defendant, as a common carrier, to stipulate for the immunity expressed on the back of the pass. The defendant being, by

the very nature of the transaction, a common carrier for hire, can not set up as against the plaintiff, who was a passenger for hire, any such estoppel or agreement as that which is insisted on. Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *R. R. Co.* v. *Lockwood*. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire."

The leading case, *R. R. Co.* v. *Lockwood*, 17 Wall., 357, was a case in which the railroad company sought to shield itself from liability to a drover who was injured by the negligence of the railroad company while he was being carried by them accompanying certain stock which he had shipped. The stock was shipped under a special contract whereby the drover had agreed to attend to the loading, transferring and unloading of the stock, and to take all risk to them and of personal injury to himself. The Court held:

"First. That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Second. That it is not just and reasonable in the eye of the law for the common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Third. That these rules apply both to the carriers of goods and carriers of passengers for hire, and with special force to the latter.

"Fourth. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

It will be noted that the relationship of Lockwood to this contract was a double one. There were, in fact, two contracts. One was for the carriage of the cattle by the company, which, as a common carrier of goods, was not permitted to insert the unreasonable stipulation for exemption

from responsibility for negligence; the other was a contract with the company as as a passenger carrier for his transportation, as to which contract such stipulation is equally invalid, but for different reasons. This distinction is pointed out in Hutchinson on Carriers, Section 567, as follows:

"This distinction is based upon wholly different reasons of public policy, being in the one case the value which the law puts upon human life and personal safety, and, in the other, the necessity of preventing frauds and combinations to the undoing of all persons who may have dealings with the carrier."

It is important to note this, as it is contended in the case at bar that the contract for the shipment of express matter was not a common carrier's contract, and therefore the Lockwood case does not apply. But the Lockwood case would evidently have been decided in the same way if there had been no shipment of cattle to be considered, for if one becomes a passenger for hire his rights as such are not affected by any contract he may make, private or otherwise, for the shipment of his goods.

The Court say, page 383:

"In the case before us, the law fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of law to allow stipulations which will relieve the company from the exercise of that care and diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

On page 376 the Court say:

"It is argued that a common carrier, by entering into a special contract with a party for the carriage of goods or persons on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases—that is, he may make any contract whatever because he is an ordinary bailee and he is an or-

dinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. * * * When a carrier has a regularly established business for carrying all or certain articles, and especially when that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the article is embraced within the scope of its charter powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character."

In the case of *R. R. Co.* v. *Curran*, 19 Ohio State, p. 1, cited in the Lockwood case, the Court say, p. 12:

"It is true that carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry, but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods, applies with still greater force in the case of passengers. The common law has a peculiar regard for human life, and for this reason exacts a greater degree of care than in relation to any matter of mere property."

In the case at bar counsel admit that in the absence of the contract the law would impose upon the railroad company the duty as a common carrier of passengers of carrying the express messenger safely. How then may it contract to be relieved of this duty? To say that the contract changed the relation of the messenger as a passenger is simply another way of saying that the contract has relieved it of the duty.

The principles laid down by the Court in the Lockwood case are enforced in the later cases of

Liverpool Co. v. *Phenix Co.*, 129 U. S., 397.
Inman v. *Ry. Co.*, 129 U. S., 128–139.
Phenix Co. v. *Transp. Co.*, 117 U. S., 312–322.

V.

Counsel rely upon the cases of

Bates v. *R. R. Co.*, 147 Mass., 255.
Hosmer v. *R. R. Co.*, 156 Mass., 506.
Ry. Co. v. *Keefer*, 146 Ind., 21.

While these Massachusetts cases hold that an express messenger for the passenger for hire of a public or common carrier, yet they are at variance with the Federal authorities in holding that an ordinary passenger for hire may, in consideration of a special privilege on the train, make a valid contract releasing the carrier from liability for negligence. The Federal rule is that no consideration can support such a contract; that the obligation to exercise the degree of care imposed by the law upon the public or common carrier can not be escaped by a contract for exemption, no matter what consideration is set up to support it.

In Massachusetts the railroad companies were required by statute to extend to all express companies the same facilities. They were therefore in Massachusetts common carriers of express companies. The messengers were required by the railroad company to sign a release, pursuant to a notice posted in the baggage car, as follows:

"No *passenger* will be allowed to ride in the baggage car of any train unless he has signed a release discharging the company from all claims in any way growing out of any accidents or injuries while riding in such car."

It was held in the Bates case that any passenger who executed this release, and who would not have been injured if he had not been riding in the baggage car, was deprived of the right to recover. And in the Hosmer case, where the accident involved the whole train and the messenger might have been injured even if he had not been riding in the baggage car, the Court, abandoning to a certain extent the reasoning in the Bates case, held that the right to ride *free* in the baggage car brought the case under the rule in *Quimby* v. *R. R. Co.*, 150 Mass., 365, where it was held that a *free passenger* was bound by the contract endorsed on his pass releasing the carrier from liability for negligence.

The Massachusetts cases concede that the rights of an ex-

press messenger are those of a passenger for hire of a common carrier. As said by the Court in the later case of *Doyle* v. *Ry. Co.*, 166 Mass., 498, reviewing these cases, they hold that

"If a *passenger* insists upon riding or is required by the nature of his occupation to ride in a place not provided for passengers, it has been held that the carrier may properly say to him that he must take the risk, however arising. *Hosmer* v. *Co.*, 156 Mass., 506; *Robertson* v. *Co.*, 156 Mass., 525; *Bates* v. *Co.*, 147 Mass., 255."

Now, treating that as an authoritative statement of the point decided in the Bates and Hosmer cases, how does it accord with the rule in the Federal courts?

Take the case of a drover. Is he not in the very language of this Massachusetts case

"A passenger who is required by the nature of his occupation to ride in a place not provided for passengers?"

May "the carrier properly say to him that he must take the risk, however arising?" Does not the Federal rule except risks occasioned by the negligence of the carrier or its agents? *Lockwood* v. *Co.*, *supra*; *R. R. Co.* v. *McLaughlin*, 19 C. C. A., 551.

If an injured or sick passenger is taken on a stretcher or mattress into the baggage car, there being no accommodations in the ordinary coaches for a man in his condition, may the carrier exact from him a release? No; the carrier having accepted one who is so obliged to ride, is bound to exercise the same degree of care for his safety that is due to any passenger. And, in like manner, the attendants of such a passenger, or a medical man engaged to attend him, would be entitled to the same protection if the carrier accepted them for passage. And the carrier can not exact the right to negligently render their journey in that car unsafe if it received them for transportation, knowing that they would be obliged to travel in that car.

Suppose the baggage master fell ill and a doctor were summoned by the conductor, he would be guilty of no contributory negligence in remaining in the baggage car long enough to render the needed assistance, and no subtlety of language could frame a release that should confer immunity upon the carrier in negligently injuring him while there.

Suppose a train break down in the wilderness, and only the engine and baggage car can proceed, the carrier could not extort a release from the passengers as a premium for permitting them to ride in the baggage car to a place of shelter. They would not even be obliged to assume the extra risk of riding in that car nor be guilty of contributory negligence in so doing. The company would simply have to be so much the more careful of its baggage car because it was full of passengers. And the carrier is bound to as high a degree of care to one passenger in such a car as to a hundred. The duty is the same, although the penalty for violation might be greater in the latter case.

The Massachusetts rule is that a passenger for hire traveling in a place of special danger may assume the risk of the carrier's negligence while there. The Federal rule is that in whatever place the carrier allows a passenger to ride he is under a public duty to make that place safe against the carrier's negligence, and can not substitute for the performance of the duty a stipulation for immunity. It is not a question of releasing the carrier as an insurer, a carrier of passengers is never so bound, but he must provide against dangers as far as his care can accomplish it, not by the right to be negligent.

It remains to consider the case of *Ry. Co.* v. *Keefer*, 146 Indiana, 21. The views of the Court are summarized, on page 34, in the following language:

"Under the doctrine declared in the Express Cases, 117 U. S., 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried with a messenger in charge, as a private carrier; the right to have it and him carried having first

been secured to the company by private contract, the only way known to the law by which the right, either as to the goods or appellee as express messenger in charge, could be acquired. Appellee, when he went upon appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried from one point to another. Carriage was not the object of his going upon the train. That was merely incidental. His purpose was not to be upon the train in the cars provided for passengers, but that he might handle and care for the property of his employer thereon in the car-space set apart in the baggage car for that purpose. Under the authorities cited, it was not the duty of the appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant, as a common carrier, could not have been compelled to grant. *Express Cases, supra; Bates* v. *Railroad Co., supra; Hosmer* v. *Railroad Co., supra.*"

The argument of this case may be analyzed thus:

The express company is a common carrier. The railroad company is not a common carrier of common carriers, therefore it is not obliged to contract as a common carrier to carry for the express company, and may thus insert in any contract it chooses to make any stipulations it may desire, even to the exemption from liability for negligently causing the loss of the merchandise carried or injury to the messenger accompanying the merchandise; that the contract is a private contract, which the railroad company may refuse to make, and it may therefore impose whatever conditions it pleases before consenting to make; that the express messenger is not a passenger for hire, to whom the carrier owes the duty of a common carrier of passengers.

The proposition that an express messenger is any the less a passenger of the railroad company because "he did not go as a passenger who merely desired to be carried on the train from one point to another," and because "carriage was not the object of his going upon the train, but was merely

incidental, that he might handle and care for, the property of his employer thereon in the car space set apart in the baggage car for that purpose," has been already examined and can not be maintained in the face of the Federal decisions as to a postal clerk and a drover, both of whom fall equally within the terms used.

There is some confusion of thought in the other proposition that because the railway company was not bound to contract with that particular express company, therefore, the rights of a messenger as a passenger are determined solely by the railroad company's contract with the express company by which his passage was secured, but not only the logic but the law of the proposition is wrong. We contend:

1. To the owners of the goods carried by the railroad company as express matter and to the messenger carried therewith, the railroad company can only limit its liability to the same extent as could any common carrier.

2. The sense in which the Supreme Court held that a railroad company was not bound to act as a common carrier of common carriers is that in the performance of its duty to the public to carry express matter and messengers it may select one agency by which to perform this duty and exclude other agencies, as it may select one employe rather than another applicant; or, as in doing business with connecting railroads in carrying to and from points beyond its line, it is at common law under no obligation to carry for common carriers, but may make such contract or none with them for connecting business as it chooses, yet, as to the property and persons carried by virtue of any contract it may make, it has no right to stipulate for exemption from liability for negligence.

In the Express Cases, 117 U. S., p. 1, the Court intimate that railroad companies are under a public duty to carry express matter and messengers, either by their own facili-

ties and force, or through the agency of an express company doing business over its line. The Court say, p. 20:

"The express business has now grown to an enormous size and is carried on all over the United States and in Canada. It has become a public necessity. It employs, for the purposes of transportation, all the important railroads in the United States, and a new railroad is rarely opened to the public without being equipped, in some form, with express facilities. It is used in almost every conceivable way for almost every conceivable purpose by the people and by the Government. All have become accustomed to it and it can not be taken away without breaking up many of the long settled habits of business and interfering materially with the convenience of social life.

"In this connection, it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The trouble in each case is not with the public, but with the single express company, and the real question is, not whether the railroad companies are authorized by law to do an express business themselves, nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person especially appointed for that purpose, nor whether they shall carry express freights for express companies as they carry like freights for the general public, but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads, the same in all respects as those they provide for themselves or afford to any other express company. It is no doubt true that every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter." And on page 24: "So long as the public are served to their reasonable satisfaction it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to what particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to *insure reasonable promptness and security*."

This would indicate that the railroad company is bound to carry express matter and messengers. If the railroad company must as to the public *insure* "security" and "reasonable promptness," it cannot be permitted to contract itself out of this duty to the public, and stipulate for release from liability to the shippers for negligently performing it, or negligently causing loss of the goods or injury to the messenger.

The question has not often arisen between an owner who has shipped by express and the subordinate carrier by whose negligence the property is lost, for the owner usually prefers his action against the express company rather than against the subordinate carrier; but in the case of *New Jersey Co.* v. *Bank*, 6 How., 343, where by agreement between the steamboat company and the express company the crate of the latter and its contents were to be carried at the sole risk of the express company, *of which contract the shipper was informed*, upon a suit against the steamboat company by the owner of the goods lost, the Court held that this agreement could not exempt it, the steamboat company, as a common carrier, from liability for *misconduct* or *negligence*, and as the Court was of the opinion that the company had been guilty of negligence, it was held to be responsible to the owner for the loss. And the Court cite (p. 380), as a precisely analogous case, that of *Sanderson* v. *Lamberton*, 6 Binney (Pa.), 129, which "was an action upon the subcontract made by the first with the second carrier for the conveyance of the goods, in whose hands they were lost." The second or subordinate carrier was held liable as a common carrier for the loss, although the first carrier could also have been held.

In the case of *Delaware, Lackawanna & Western Ry. Co.* v. *Ashley*, 67 Fed. Rep., 209, the Lackawanna Ry. Co. was a subordinate carrier of Ashley who traveled in charge of certain live stock shipped originally on the Cleveland Railroad

Company's line on a through bill of lading. The car of live stock with Ashley in charge was tendered by the Cleveland Railroad Company at Buffalo to the Lackawanna Co., which as a condition of accepting it or acting as subordinate carrier under the Cleveland Company's contract of through shipment, required Ashley, who was in charge of the live stock, to execute a release from liability for negligently injuring him while being transported. Ashley executed the release and was injured while being carried by the Lackawanna Co. It was held in an action by him to recover for the injury that the release was invalid, and this ruling was affirmed by the Circuit Court of Appeals.

It would seem that this case presents a close likeness to the case at bar. The Lackawanna Railway Company was no more bound to carry the freight and man in charge for the Cleveland Ry. Co. than in the case at bar, the railroad company was bound to carry the goods and man in charge for the express company. But when it did accept the man in charge he became the passenger for hire of a public or common carrier, despite the contract releasing the railroad company from liability for negligently injuring him.

An express company like a railroad company which has contracted to deliver merchandise at a point beyond its own terminus must employ railroad companies, who act as subordinate carriers, to carry for it to destination. And if the property shipped, whether live stock or valuable parcels, be of a character requiring a messenger or drover to accompany them, the relation of such messenger or drover to the railroad companies carrying him is that of a passenger for hire of a common carrier, which relation is not changed by any release he may execute to the railroad company, for such release so far as it attempts to exonerate the common carrier from the duties imposed upon it by law is illegal and void.

In the case of *Atchison Ry. Co.* v. *Denver Ry. Co.*, 110 U.

S., 667, cited in the Express Cases, the Denver Company, whose track intersected that of the Atchison Company, sought to compel the latter to do a connecting business—to interchange freight and passengers at the point of intersection, and showed that the Atchison Company did such connecting business with the Rio Grande Company at a similar intersection near by.

The Court held, p. 682:

"Under these circumstances, to hold that if the Atchison Company continued to stop at the Rio Grande station after the Denver road was built, a refusal to stop at the junction of the Denver road was an unreasonable discrimination as to facilities in favor of the Rio Grande road and against the Denver road would be, in effect, to declare that every railroad company which forces a connection of its road with that of another company has a right at common law to require the company with which it connects to do a connecting business at the junction if it does a similar business with another company. Such is not the law. * * * Whether a connecting business shall be done over them after the physical union of the two roads is made depends on legislative regulations or *contract obligations*."

The Atchison Company, not being a common carrier for common carriers, was under no obligation to treat all common carriers alike, or haul for them over its line on the same terms as to division of rates or otherwise.

It might make whatever contract it pleased or none at all. It might therefore oblige any one of these carriers, as a term in any contract it might make, to include, for example, a stipulation for indemnity against liability for negligently injuring passengers or freight delivered to it.

But if such contract were in fact entered into, it could not determine the liability of the carrier for negligently injuring freight or passengers as between itself and the shippers or passengers, or for injuring a drover whose right to be upon the train was secured by such special contract, even if the drover did not go as a passenger who merely desired

to be carried on the train from one point to another, to whom carriage was not the object of going upon the train, but was merely incidental, and even if the drover had signed a release.

Nor if the initial carrier under such a private contract delivered to the second carrier a Pullman car of excursionists with their cook, and the cook, whose fare has been paid, was injured in an accident on the road of the latter company. The cook would be none the less a passenger because with him, in the language of the Indiana case, carriage was not the object of his going upon the train, but merely incidental, and his purpose was not to be upon the train in the cars provided for passengers, but that he might handle and care for the property of his employer in the car-space set apart in the car for that purpose.

Indeed, the whole argument rests on the fallacy that when a man becomes a passenger in pursuance of a contract for private shipment of goods his rights as a passenger depend on the terms of that contract, because the carrier had the right to refuse to contract, and therefore to make whatever contract it pleased. If that were so, then any private contract the railroad company might make involving as an incident the transportation of a passenger might undertake to fix the rights of such passengers. A man, who, having furnished locomotives to the railroad company was bound by the contract to make periodical trips to inspect them, might be required to release the company from negligence. Or to consider, as an illustration, the case of *Railroad Co.* v. *Stevens*, 95 U. S., 655, where, as an incident to a proposed contract for the use of a patented car coupling, a pass is issued to an inventor in order that he might exhibit his invention to an officer of the company. This transportation is incident to a purely private contract into which the railroad company is in no wise compellable to enter. The Court held that such

a contract can not by any stipulation for release deprive the passenger of his right to be safely carried. Or suppose, as often happens, a pass with such a stipulation is given to an inventor as part of the price or royalty for the use of his invention. It is unnecessary to argue that such a stipulation would be void. Yet the contract for the invention is not one into which the carrier must enter.

In *Pearson* v. *Duane*, 4 Wall., 605, the carrier was held liable to a passenger whom it might have refused and the Court say should have refused. Yet the carrier in accepting him would have had no right to stipulate for exemption from liability for negligence. A steamship may be so crowded that it may decline to take any more passengers, but if in that state of facts an applicant is given the captain's cabin, or accommodation in some part of the boat not provided for passengers, a release taken under those circumstances would have no more validity than if taken from any other passenger on the ship. A drunken man may be refused, but if accepted the company can not relieve itself from liability for negligently carrying him. So even if the railroad company has the right to refuse to carry an express messenger, it by no means follows, but on the contrary begs the whole question at issue, to claim that it may accept him on terms which relieve it from the duty which it assumes by accepting him at all—that of using due care to carry him in safety. There is yet to be found any case where a Federal Court has sustained the contract of any carrier exempting it from liability for negligence injuriously affecting in life or limb any passenger, whether gratuitous or for hire.

In *Mitchell* v. *Marker*, 62 Fed., 139, Mitchell owning an office building, was held to be a common carrier of passengers carried on an elevator. Would he be any the less such if he rented the top floors of his building to an express company, and made with it a contract for indem-

nity? Or, if the express company should procure for him a release from liability from negligence in carrying messengers and employes with express matter who mightuse the elevator in transit between the offices and the street? If so, then such contracts with tenants will save the present expense of insurance, and if not, then the rule should apply to horizontal as well as vertical transportation.

And the express messenger does not even derive his right to be carried from the contract alone. His right to use the public conveyances of the country in the vocation in which he labors is one of which he can not be deprived. If he could be, then all of his class could be so be denied, and the carrier would stand convicted of a refusal to perform the public duty of carrying express matter over its railroad. It does not answer to say that the railroad company may choose to do its own express business, for the messenger must still be carried, and though in the capacity no longer of a passenger but an employe, yet no stipulation for release from its negligence will avail to protect the carrier as his master. Or, if he chose to carry on, as an express messenger, a business limited to such papers or bank collections as should not require the use of the express car, why may the carrier deny him the right to travel by the public highway or the public conveyances, provided his fare was paid and his behavior unobjectionable?

The cases of

Coup v. *Ry. Co.*, 56 Mich., 111.
Ry. Co. v. *Wallace*, 66 Fed. Rep., 506.
Robertson v. *Ry. Co.*, 156 Mass., 525.

were evidently decided under the influence of the English doctrine that a contract for the transportation of live stock is not a common carrier's contract.

This doctrine was not without its influence upon some of the earlier stock-drover cases, but was disapproved by the

Supreme Court of the United States and for reasons which we think apply to the case of a person injured or killed while being transported under a "circus train" contract.

In any view, however, these "Circus Train Cases" present no real analogy to the case at bar.

The goods or things to be carried—the subjects of the bailment—are not such as the carrier is under any public duty to carry or holds himself out as in the business of carrying. The contract is entered into as a special accommodation. It is not the daily occupation of the carrier, nor is it a public necessity that circus trains be afforded railroad facilities. The wild beasts and paraphernalia are not of a kind that the carrier is prepared to care for or be responsible for. None of the cars belong to the company; it does not inspect them or repair them, nor may it adapt them to the tracks, curves or bridges on its line. The train itself does not belong to and is not in the custody of the carrier. The service is performed under conditions so unusual, so unlike anything in the line of the carrier's occupation, and fraught possibly with so many perils that in the ordinary course of the carrier's business can not be anticipated or provided against, that the carrier might, if ever, be permitted to substitute for the necessity of taking such unusual and unfamiliar precautions a contract for immunity. It is almost a misnomer to call it a contract of release from liability for negligence, for negligence is the breach of a duty and what duty did the carrier assume either by the contract or as a matter of law except to tow the circus cars over its track?

In the last cited case, that of *Robertson* v. *R. R.*, 156 Mass., 525, the carrier made a special contract to haul circus cars, the property of and under the control of the circus company, under a contract by which the circus proprietor assumed all risks of injury to the persons or property carried. One of the cars broke down by reason of a defective truck. It was held that as the defendant had no

control over the condition of the cars and no power to infere with them, it was under no duty to the injured person to inspect the cars. Consequently there was no negligence, and no one has ever contended that a carrier has not the right to contract for exemption from liability for loss *not* occasioned by its negligence.

The other "Circus Train Cases" were suits by the owner for injuries to his property. Neither was an action for personal injuries *by the person injured*. Nor do they decide that in an action for personal injuries the liability of the carrier to the person injured would be governed by the contract with the circus owner and not by the law of liability for failure to exercise due care.

Counsel say that the railroad company's agreement is simply to tow the express car as a steamboat tows a barge or an engine tows a circus train. On the contrary the distinction is of essence. The railroad company's contract with the express company is one of carriage, not of towing. It agrees to carry on its train the express freight and messenger, and the express company, although the carrier of the merchandise, never became the carrier of the messenger. The express company is no carrier of passengers. The railroad company is the only carrier concerned in or responsible for the safe carriage of the messenger. The express company simply agreed to pay his fare and insure the railroad company against liability for injuring him. A railway train is a unit, not a group of separate parts, and the express car belongs to the railroad company as much as does any other passenger coach or freight car, the express company having only the right to have its parcels and the messenger carried therein. The express car is not hauled separately. It is part of the train as a link is part of a chain. All parts of the train have the same starting point, the same inspection, the same crew, the same time card, the same train orders, and

are under the same command and control as a unit. The separate cars are no more separate units than are the cabins or compartments of a steamer. And the conductor bears to the whole train the same relation that the captain bears to a steamship. An express agent on a railroad train does not differ from one traveling under the same kind of contract on a steamboat where there can be no pretense that he is being carried in a special or different vehicle from the other passengers. It might as well be said that the contract with a drover to furnish a stock car for his cattle is a contract to tow a special car, and not a carrier's contract.

The agreement between the express company and the railway company was not to a tow a car, but to furnish accommodation on the railway company's trains. On one train this might involve providing a separate car, on another space in the baggage car, on another space in an ordinary passenger coach. The railway company was not bound to provide a separate car on this train unless the volume and kind of business required it.

The railway company could have placed the express car in the rear or the middle of the train. The position, in fact, assigned to the express car was a mere matter of convenience. Except so far as the convenient and safe carriage of the express company's parcels required, the express car was wholly under the management and control of the railway company's conductor and train crew.

A railway company is not less the carrier of a passenger because it permits the Pullman Company to carry him in a car of its train in which nobody may ride except upon condition of complying with the Pullman Company's rules. In short, the special car is a mere matter of convenience to the railway company in handling the express business. Such arrangement does not alter the legal relation of the carrier and the messenger, for the carrier can not deprive

a passenger of his character as such by putting him in a special car or by erecting a partition between that part of the car which he occupies and that occupied by the other passengers.

Counsel, in referring to the illustration used by the Supreme Court in the Lockwood case in describing a contract of private carriage, *i. e.*, that of a common carrier of truck agreeing, as a special accommodation, to transport articles of special value, lose sight of the very distinction the illustration was employed to enforce, viz., that the owner of such a vessel has a broader right to decline employment and dictate terms than has a railroad corporation organized and enjoying peculiar franchises as a public carrier. The former may become, as to a special service, a private carrier; the latter can not, by agreement or by calling itself a private carrier, change the nature of the duties owed by it to the public. This important distinction between the public obligation resting upon a railroad company to do or permit to be done over its lines an express business and the obligation of a mere casual undertaking of private carriage, upon extraordinary occasion, outside of its business and foreign to its duties as a railroad company, is throughout the argument overlooked or ignored by counsel.

We have not disputed the proposition that a railroad company is not a common carrier of express companies. As between them it may discriminate or it may deny them privileges, but as to the persons and goods received by it for transportation it owes a duty of diligence to the person carried and to the owner of the goods which it can not escape by contract or notice. It owes the duty, as the Express Cases put it, to carry for the public with "reasonable promptness and security." Its relations to the persons and goods carried and its relations to the express company, are the same as if it were carrying for a connecting carrier,

who had issued a through ticket or a through bill of lading for the goods.

While the express company might agree to indemnify the railroad company against claims for damage by negligence to persons or goods carried, yet it could not, by any such contract, deprive persons carried or the owners of the goods carried of their right of action against the railroad company for negligence. The express company can not sell such a right of action, nor can the railroad company, either mediately or immediately, buy such immunity.

We concede without question that the contract between the express company and the railroad company, so far as it grants exclusive privileges to the express company, is a private contract, and that the fare of the messenger is covered by the contract, and to that extent his right to be on the train depends upon the contract and his employment by the express company. But that does not affect his status as a passenger or his right to safely travel. The railroad company might make a private contract with a bridge builder to repair a bridge, and agree that it would transport his workmen in the baggage car without charge. As soon as they boarded the train the jural relations of passenger and carrier would be entered upon, and there would arise a duty of care on the part of the carrier independent of and not to be affected by the contract between the railroad company and their employer. Nor would any contract of theirs with their employer to release the carrier from liability for negligence be valid here, although made a condition of their employment, however it might be in a jurisdiction which permitted the carrier to so contract with a passenger.

It is true, as counsel urge, that contracts of this nature are sustained in New York, Massachusetts and Indiana. But such ruling in the New York cases is expressly put upon the ground, as in England, not that the ordinary re-

lation of common carrier and passenger for hire does not exist between the express messenger and the railroad company, but that any passenger for hire of a public or common carrier may release the carrier from liability for negligence for a consideration, such as reduction of fare; and in Massachusetts that this may be done by a passenger for hire of a common carrier in consideration of a special privilege of riding without extra charge in a special part of the train. The simple answer to this is that such is not the Federal rule. The Massachusetts case also relies upon the analogy between the free privilege of riding in a special part of the train and the privilege of riding on a free pass with similar stipulations, which it had already held in such case valid. But this Court has strongly intimated that it would not so hold. *Ry. Co.* v. *Stevens*, 95 U. S., 655.

In the Indiana case such contract is sustained on the assumption that a railroad company, in selecting an express company as its agent in discharging its public duty to carry express matter, may by contract stipulate for exemption from the duty imposed by law to use due care to carry the messenger in safety. Such doctrine, we submit, can not legitimately be derived from the authorities relied upon by the Court in that case, and its vice becomes apparent when it is tested by the analogy indicated by the Supreme Court in the Price case (113 U. S., 218), between an express messenger and a postal clerk. To be consistent, the Indiana Court must hold either that a postal clerk is not a passenger for hire of a common carrier, or that as a passenger for hire of a common carrier he may make a valid contract exempting the railroad company from liability for negligence. Neither of these propositions is law in the Federal courts.

Counsel cite the Seybolt case, 95 N. Y., 563, in support of his proposition that "a postal clerk stands on an entirely different footing from an express messenger" be-

cause he is secured "an absolute statutory right to transportation over the railroad." But in *Price* v. *R. R. Co.*, 113 U. S., 218, the Court hold that this is not true; that the postal clerk does not derive his right to be carried from the statute, and does not stand on any different footing from an express messenger. It is true the Court do not particularize an express messenger, but the language used precisely describes such an employe.

Counsel have commented upon the large number of authorities establishing the proposition that an express messenger is a passenger for hire, and say that as there was in none of these cases any contract defining the rights of such a passenger for hire, these authorities have no bearing. It will be observed, however, that in quite a number of these cases such a contract attempting to limit the rights of the passenger *was* involved, and in each case the Court, so far from considering that the messenger ceased to be a passenger for hire by reason of the contract, treated the contract as one attempting to limit the liability to him as a passenger for hire, not to be be distinguished in any way from any other passenger for hire of a common carrier, and the only question was how far could such a contract be valid as against the rights of passengers for hire generically.

Jones v. *Ry. Co.*, 125 Mo., 666.
Kenney v. *Ry. Co.*, 125 N. Y., 422.
Brewer v. *Ry. Co.*, 124 N. Y., 59.
Jennings v. *Ry. Co.*, 15 Ont. App., 477.
Chamberlain v. *Pierson*, 87 Fed., 420.

And it is surely a novel proposition in the Federal Courts that a passenger for hire, entitled to the high degree of care exacted by public policy from a common carrier, may cease to be a passenger for hire by virtue of a contract exempting the carrier from negligence. The answer seems to be obvious. If a man is a passenger for hire, as these cases decide, entitled to the highest care on the part of the

carrier, then *no* contract for exemption from this duty is valid, and it is therefore not only immaterial what contract the carrier had made, but whether it had made any at all. Even in the instances where the carrier was not bound to accept the passenger, it could not as the price of its acceptance impose any such contract.

And under the contract entered into by the railway company it did not refuse to accept the express messenger as a passenger, and the express company was not bound to exact such a release from the messenger. Its only stipulation was that the express company should insure it against the liability it would be under if it negligently injured such passenger. The railway company might have effected such insurance with the express company for all the passengers on the train without affecting their right to recover, even if the express company had thereafter procured from every passenger a contract releasing the railroad company. Such a contract of release would be no more valid than if made by the passenger directly with the railroad company.

While counsel for plaintiff in error urge the proposition that the railroad company may avail itself of this exemption, because in accepting the express messenger it had the right to fix whatever conditions it chose, the inconsistent proposition is also advanced that the conditions it did in fact impose did not establish his status while so traveling. The fallacy is apparent. If the contract between the railroad company and the express company provided, as it in fact did provide, that the railroad company would accept for passage and carry the messenger without other condition than that the express company would indemnify the railroad company from its liability for negligently injuring him, then if the messenger presented himself for passage the railroad company can not superadd or require a stipulation for release, either for its benefit or for the ben-

efit of the express company. Nor can the express company interpolate such a stipulation after the railroad company has agreed to accept the messenger without it. Such release would have no validity. This form of contract was doubtless drawn at the headquarters of the United States Express Company in the state of New York, where such a contract is valid. It is drawn upon the lines indicated in the Kenney case, the latest decision of the New York Court of Appeals upon the subject. The contract is valid in New York and the effort is here made to claim for it legal validity, not on the ground recognized in the New York Courts, however, that a passenger and carrier may make such a contract, but on a ground which the New York Courts repudiate, that the passenger is not a passenger, and the carrier is not a carrier in legal intendment.

We make no such contention as is imputed to us that a railroad company must permit an express company to do business on its passenger trains. We concede that the railroad company may do its own express business or may refuse to do the express business on its passenger trains; may have, for example, a special train consisting of nothing but an express car and a postal car. But the express messenger and postal clerk would be entitled to the same care and protection as if they were traveling in a passenger train. And if the railroad company chose itself to do the express business with the messenger as its employe such a contract for exemption from the duty imposed by law, of care for his safety or of release from any liability it might be under for negligence would be equally invalid.

Of the three grounds upon which a common carrier is not permitted to stipulate against its own negligence, it seems clear that all are present: 1. It is conceded that in the absence of the contract the duty would be imposed by law to carry the messenger safely. Is not the contract, then, an

"effort to release the carrier from a duty imposed by law?" 2. "The parties do not deal on an equal footing." That is, the railway company might compel an intending traveler to give up his journey, and lose the benefit of it to his business, if he would not execute the release. Precisely the same compulsion, under the same circumstances, is put upon the messenger. 3. "The stipulations tend to a relaxation of that vigilance which the carrier should exercise." Is not the safety of the other passengers in the train affected if the carrier may with impunity derail the express car and kill the messenger.

Counsel say the messenger was not a passenger nor even an employe of the railway company, but no authority is cited for this assertion, and no attempt is made to define his status. He was no trespasser. He was on the train of a public carrier of passengers with its knowledge and consent and for fare paid and accepted. We know of no definition of a passenger that would exclude him. He was not a mere licensee. *Bennett* v. *Ry. Co.*, 102 U. S., 584.

Counsel assert that the railway company received no compensation for carriage of the goods, has no custody of them, nor any lien for freight. The fact that the compensation comes to the railroad company in a lump sum does not make it any the less payment for the services rendered, which were essentially the carriage of the goods and messenger. If the railroad company chose to receive from a connecting carrier all its cattle business for a lump sum per annum in the custody of drovers, and waive its lien for freight, it would none the less be liable to the shipper and drovers for its negligence as a common carrier.

The case cited by counsel, *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S., 174, simply holds that an express company is as to the shippers a common carrier of goods received by it for shipment. The Court do not decide that the railroad company is not also a common carrier of the

goods. But in any view the deduction that the railroad company was not a common carrier of the messenger because it might not be as to the goods is a *non sequitur*; for while the express company was a common carrier of the goods it was not a carrier of passengers. The railroad company was the *only* carrier of the messenger. The express company agreed with the shippers to carry the goods; it never agreed with the messenger to carry him; it simply paid his fare on the regular conveyances between the points it had agreed to send the goods in his charge. Had he carried them all in a valise in the parlor car the express company would still have been a common carrier of the goods and he the passenger of the railroad company, not of the express company.

In the inception of the express business Harnden in person collected the parcels, specie, drafts, etc., from his customers and carried them in a satchel from New York to Boston, paid his fare and made the journey by whatever train or steamboat best suited his convenience. There could be no pretense that he was not an ordinary passenger for hire, and when his employes were sent these did not cease to be such passengers.

Suppose today an express messenger with a valuable package takes an omnibus or a street car on his way to the train: Is the street car company any the less a common carrier of the messenger because he happens to be a servant of another common carrier?

Counsel ask whether the railroad company would be liable if the express company ran its own train over the railroad company's roadbed instead of employing the railroad company to carry the freight on its train. It may be the railroad company would not be responsible for the passengers on another company's train—a train which it did not inspect, control or run; but, as in the case at bar, the messenger was injured by the railroad company's neg-

ligent running of one of its own trains upon which it had undertaken regularly to carry him, the analogy fails in the most important feature.

To the suggestion that railway companies can not do an express business, it may be answered that some of them do conduct such a business, and that nothing but considerations of profit and convenience deters any railway company from it. It is merely a matter of proper organization. As a rule the railway companies prefer to leave the express business to independent companies, just as formerly they relinquished certain kinds of freight business to what were called fast freight lines.

Counsel cite no authority to support the proposition that if the railroad company is a private carrier it may stipulate for immunity in *negligently* injuring the messenger, and we conceive the contrary is true. A much less degree of care than is required of a public carrier would satisfy the obligations assumed by a private carrier. Against liability for want of skill, knowledge, or sound judgment, a private carrier may perhaps relieve himself by contract, for he is not necessarily held to the exercise of such qualities; but against liability for pure negligence, inflicting personal injuries—a breach of such duty as is required by the law—there is no Federal authority which recognizes his right to exempt himself.

Counsel say the express car is "rented" to the express company, and practically belongs to it. This will not stand the test. If the express company should act on that theory and take the car to any other road, or use it between trips as a warehouse or depository for packages, the railroad company would put a different construction on the arrangement. It is a contract merely for carriage in car space in motion over the line. The express company has no other right or title to the car, and could not put in it any person other than the messenger. It is quite analogous to the

title a passenger has to his seat. He may occupy it and within the limits recognized by the railroad company put his packages in it, but he has no other right to it.

To sum up, we would say the relations of a railroad company to the goods and messenger carried under the contract with the express company are the same as those of any subordinate common carrier under a contract of through transportation.

No such subordinate carrier may exempt itself by contract with the initial or primary carrier from liability to shippers and passengers for negligently injuring goods or passengers, though it may stipulate for indemnity or insurance.

An express messenger who has made no contract releasing the railroad company bears to it the relation of a passenger for hire of a common carrier. This is established by all the authorities and practically admitted by counsel.

To say that the contract of release changed the relation of the express messenger to the railroad company as its passenger for hire is but to say that a common carrier may by contract relieve itself from liability for negligently injuring its passenger for hire.

It is not necessary to here argue that such a contract can have no such effect.

We submit that the question certified should be answered in the affirmative.

Respectfully submitted,

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EDGAR W. CIST,
Of Counsel.

No. 88.

Reply Brief of Cist

SUPREME COURT U. S.
FILED
DEC 19 1899
JAMES H. McKENNEY,
Clerk.

Filed Dec. 19, 1899.

Supreme Court of the United States

OCTOBER TERM, 1898.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY

versus

WILLIAM VOIGHT.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Reply Brief for Defendant in Error.

CHARLES M. CIST,
Attorney for Defendant in Error.

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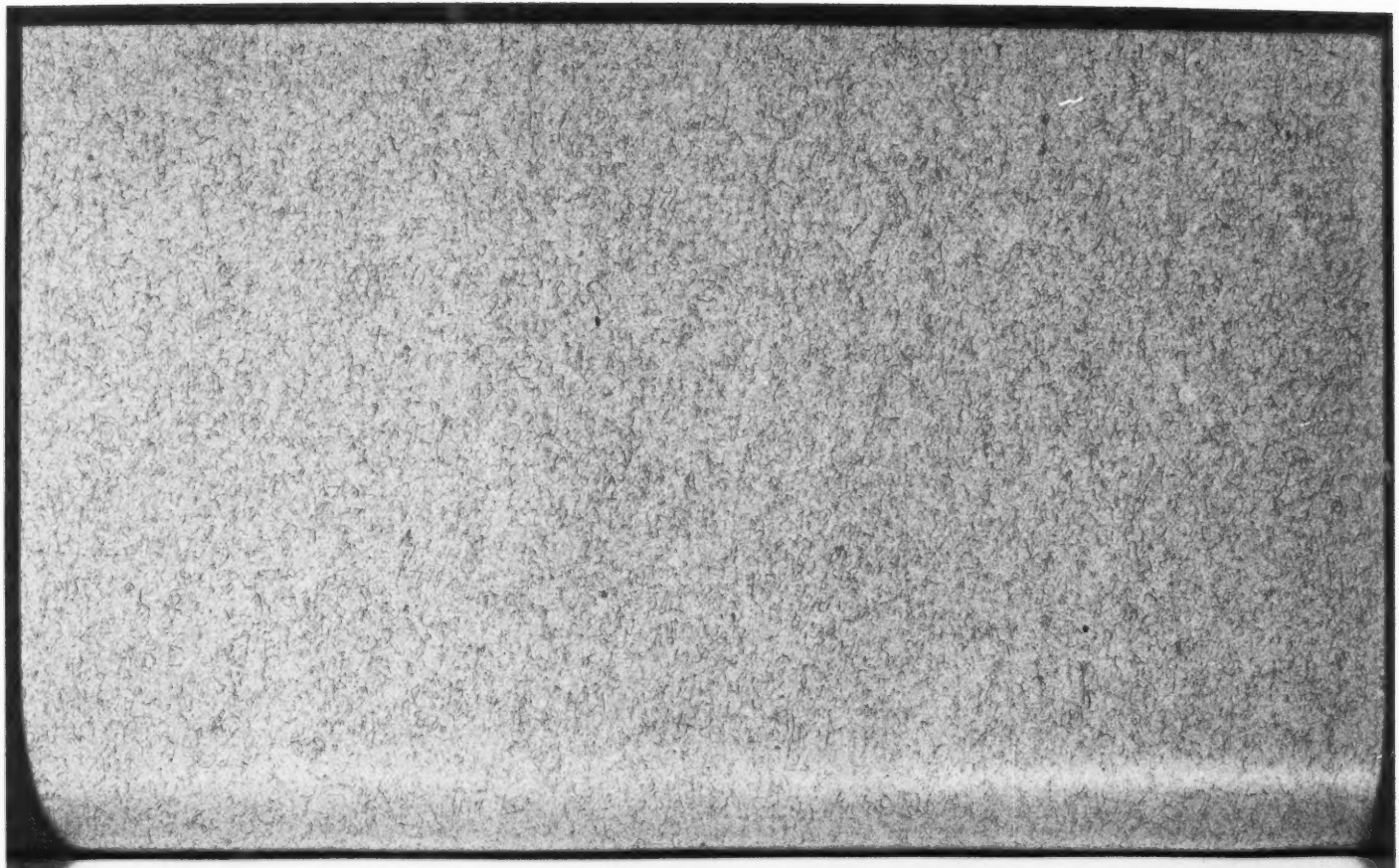

Supreme Court of the United States

OCTOBER TERM, 1898.

THE BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

No. 88. *vs.*

WILLIAM VOIGT,
Defendant in Error.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Reply Brief for Defendant in Error.

The inquiry in the case is as to the relation of an express messenger to the railroad company which transports him under a contract of release.

It is clear from all the authorities and is conceded by counsel for plaintiff in error (Reply Brief, pp. 2, 3 and 5) that in the absence of any contract releasing the railroad company from liability for negligently injuring him, the messenger would be carried by the railroad company as an ordinary passenger for hire of a common or public carrier, and that the law would impose upon the railroad company the duty of exercising the highest degree of care for his safety.

The only difference that counsel can suggest between a postal clerk, who is recognized everywhere as a passenger for hire of a common carrier, and an express messenger, who fre-

quently occupies a part of the same car as a postal clerk, is that the postal clerk has executed no release to the railroad company (Reply Brief, p. 5).

It is established by the decisions of this Court that a contract releasing a common carrier, especially a railroad company chartered as a common carrier, from liability for negligently injuring one who travels as its passenger for hire is nugatory and void. *Hartford Ins. Co.* v. *Ry. Co.* (not yet reported); *Ry. Co.* v. *Stevens*, 95 U. S., 655; *R. R. Co.* v. *Lockwood*, 17 Wall., 357.

The claim is nevertheless made in the case at bar that the contract releasing the railroad company from liability for negligently injuring one, who, but for such contract, would have been its passenger for hire is not nugatory and void, but has the effect of cancelling the relation of the express messenger to it as its ordinary passenger for hire so that it becomes competent to enter into such contract relieving it from the duty imposed by law of exercising due care to carry the messenger safely.

This reasoning was expressly disapproved in *R. R.* v. *Lockwood*, 17 Wall., 357. The Court say, at page 373:

"It is argued that a common carrier by entering into a special contract with a party for the carriage of goods or persons on modified terms drops his character and therefore may make any contract he pleases—that is, he may make any contract whatever, because he is an ordinary bailee, and is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning."

And on page 383:

"The law fixes the degree of care and diligence due from the railroad company to persons carried on its trains. The failure to exercise such care and diligence is negligence which needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care or diligence or which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence."

So also in *Bank of Kentucky* v. *Express Co.*, 93 U. S., 180, the Court say:

"We have already remarked, the defendants were common carriers. They were not the less such because they had stipulated

for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, *not by the contract they made respecting the liabilities which should attend it.* Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

In the case at bar, by the nature of its business the railroad company was a carrier of passengers, and its liability to a passenger who traveled as a messenger for an express company is not determined by the contract it made respecting the liability which should attend the carriage.

See, also, opinion of the Circuit Court in this case, which we print as an appendix hereto.

I.

The Expressman's Right to Travel by Public Conqeyances.

An expressman, traveling as such, may not be refused passage by a common carrier, if he require no accommodation or facilities on the carrier's vehicle greater than or different from ordinary passengers. Such an expressman could not be denied access to a street car, an electric car, an omnibus, a railroad train or other public conveyance so long as he sought no greater privileges than other passengers. His *status* under those circumstances is obviously that of a passenger for hire of a common carrier indistinguishable in character and rights from an ordinary passenger. Then when the expansion of his business requires, for the mutual convenience of himself and the railroad company, that he shall have an extra amount of space on the train, or be put into a separate car, his relation to the railroad company does not differ from that of a drover who might travel in a passenger car, but the demands of whose business require, for the mutual convenience of himself and the railroad company, that he shall have an extra amount of space and shall travel in a special car not provided for passengers. While the railroad company may not be obliged to yield to an expressman or a drover special facilities upon the train, yet the fact that the carrier yields facilities which it might refuse does not make it a private carrier (*Hanni-*

bal R. R. v. *Swift*, 12 Wall, 262). Therefore it can not, as the price of such facilities, or at any price, purchase exemption from liability for negligently injuring one who, although such special facilities on such terms are conceded, is its passenger for hire.

Counsel for plaintiff in error insists that an express messenger is not entitled as a matter of right to occupy a special car, and therefore, the carrier having the right to refuse him the special car, has the right to exclude him from the train, and therefore, not being under any duty to carry him may, in consenting to do so, impose the stipulation for release.

The vice in this reasoning is that it confuses the distinction between the right of the messenger to access to the train which is his by law and his right to special accommodations on the train which he must acquire by contract.

This distinction between the right of a person to be admitted by a common carrier as a passenger and the right of the carrier to refuse him special accommodations on the vehicle is recognized in *Hall* v. *DeCuir*, 95 U. S., p. 501, where the Court say :

"Corresponding views are expressed by the Supreme Court of Michigan in an analogous case in which the distinction between the right of an applicant to be admitted on board and his claim to what part of the vessel he shall occupy, is clearly pointed out. Referring to that subject the Court say the right to be carried is one thing and the privilege of a passenger on board as to what part of the vessel may be occupied by him is another and a very different thing ; and they add that it is the latter and not the former which is subject to reasonable rules and regulations and is, where such rules and regulations exist, to be determined by the proprietors."

And the right of the carrier to exact a contract for special facilities does not include the power to impose an unreasonable condition upon the messenger's right to travel as a passenger.

So in the case at bar the right of the express messenger to be carried as a passenger is one thing and is not affected by the right of the carrier to refuse him special facilities or accommodations on its vehicle. Therefore if the railroad company sees fit to accord him such special accommodations, the messenger in accepting the same does not cease to be its passenger for hire even though the railroad company seek to divest him of that character

by exacting a release as the price of such special accommodation.

And again, at p. 503 :

"The law implies a contract which obliges the carrier to furnish suitable accommodations according to the room at his disposal, but the passenger is not entitled to any particular apartments or *special accommodations.*"

And if the carrier sees fit to provide special accommodations it can not, as the price, stipulate for a release. That was settled in the Lockwood case. The carrier could have refused Lockwood passage on the freight train, sending one of its own employes with the cattle, and requiring Lockwood to ride on its passenger train. But when it did accord him the special facilities on a car not intended for passengers, it could not, as the price, stipulate for exemption from liability for negligently injuring him.

A public carrier may have the right to refuse to carry, but if, having such right to refuse, it accepts the persons or merchandise, it must do so as a common carrier.

This was determined in the case of *Hannibal Railroad* v. *Swift*, 12 Wall., 262. The syllabus reads :

"2. If a common carrier of passengers and of goods and merchandise have reasonable ground for refusing to receive and carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground if desirous of avoiding responsibility. If not thus insisting he receives the passengers and their baggage and other property, his liability is the same as though no ground for refusal existed.

"3. The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the carriage in which it is transported, or the fact that the carriage is loaded by the owner.

"4. It is not a ground for limiting the responsibility of a common carrier, where no interference is attempted with his control of the property carried, that the owner of the property accompanies it and keeps watch for its safety."

Counsel's argument may be thus stated :

The express messenger derives his right to be carried and his right to use the express car solely by virtue of the contract between the express company and the railroad company. The railroad company not being obliged as a common carrier to furnish special facilities to the express company may, in making the contract to

carry the express messenger, stipulate for a release from liability for negligently injuring him while being carried.

When analyzed this will be found to be reasoning in a circle.

Counsel's first position is: "The express messenger is not an ordinary passenger for hire because he travels in a special car." The answer is that in providing the express messenger with special or different accommodations from an ordinary passenger the railroad company does no more than it does for every stock drover whom it permits to ride on its freight trains, and therefore the messenger, so far as the special car is concerned, is no less a passenger than is the stock drover.

Counsel reply: "But a stock drover is on the freight train by virtue of a common carrier's contract for shipment of his cattle, while an express messenger is on the train by virtue of a private contract."

The response is that, if a person is traveling on the freight train for compensation accepted by the railroad company, it is of no importance whether he is there as a stock drover or in connection with the shipment of any freight; the fact that the company accepted compensation for his passage on that train makes him its passenger for hire although it might have refused him carriage on its freight train.

Thereupon, counsel return: "But in such case he is a passenger for fare paid and received while the express messenger is on the train by virtue of a contract with the express company which the railroad company was not obliged to make and did not make as a common carrier."

The answer is: "The messenger's fare is included in the general compensation paid by the express company to the railroad company, and the fact that the railroad company carried him as an incident to a private contract into which it was not obliged to enter, does not signify. If it had made a contract with a telegraph company to carry their electrician to keep the wires in order without other fare than the rent of right of way and station facilities, the fact that it was not bound to enter into that contract does not alter the relation of the electrician to it as the passenger for hire of a common carrier."

"But," counsel urge, "the electrician travels in an ordinary

passenger car, he does not require and is not carried in a separate car not intended for passengers."

With this the circle is complete, and we get back to the original proposition that the fact that the messenger rides in a special car or special part of the train alters his relation to the railroad company. We have seen that it does not; that no matter how or where the railroad company, by reason of the exigencies of its business, puts the passenger, it is bound to the same duty of care for his safety, and can not put off or "contract itself out of" the duty.

As this Court held in the Lockwood case, it is against the policy of the law to permit a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants, and that this applies with especial force to the carriers of passengers for hire.

It will be observed that the Court place the invalidity of the stipulation upon the ground that Lockwood was a passenger for hire—not that his passage was an incident to the common carriers' contract for shipment of the cattle. It was as a passenger for hire, irrespective of the occasion which led to his taking passage, that his release was invalid.

II.

The Special Car.

It may be well to point out the further reasons why an express messenger's rights as a passenger ought not to be determined from the fact that in the case at bar he occupied a car not used by passengers, but set apart by the railroad company for the express and postal business, for this is a mere adventitious circumstance, and in no sense a characteristic of the business or an essential element in the relations of the parties. Many express messengers travel on steamboats, and merely occupy a separate stateroom, as do other passengers; many travel in a compartment of a regular passenger coach; many, when the business of the route is inconsiderable, occupy an ordinary seat in the regular passenger coach, with their packages within reach. It could hardly be said that their relation to the railroad com-

pany varied with their location on the train; for that would be to hold the release void on one day when the messenger traveled in a passenger car, and valid on another when he might occupy the baggage or express car.

And in the changing conditions of transportation the electric lines are beginning to be used for express business, affording as they do, speedy and frequent access to the country surrounding every large city, and in many instances from city to city. No special cars are needed for the transaction of an express business over such lines. The trips are so numerous and so cheap that on no one car does the messenger require more space than is accorded to the residents along the line for their parcels. Yet the relations of the messenger as passenger of the carrier are the same as if the space he required for the packages he carries was much greater. In fact, if the contention of our adversaries is correct, any street car or omnibus company may refuse to carry an express messenger on his way to the train unless and until he should sign a contract exempting it from liability for negligence.

Frequently express messengers on their return trip travel without packages and ride wherever they choose on the train. Their right to ride is secured by the same contract that covers transportation of express matter, and in every respect their relation to the carrier on the journey is the same as if they rode in an express car. Are we to understand that counsel would contend that if in the case at bar the messenger had been so returning and was riding in the passenger car the contract for immunity in negligently injuring him would be valid? And yet if counsel does not so contend, he fails to point out any substantial ground upon which to rest a distinction.

Moreover, it is well settled that the fact that one travels in a special car, or a car not intended for ordinary passengers, does not alter his relation to the railroad company as the passenger for hire of a common carrier.

A drover, accompanying cattle, travels in a car on a train not intended for passengers. Yet he is a passenger for hire of a common carrier. *Horst* v. *Ry. Co.*, 93 U. S., 291; *R. R.* v. *Lockwood*, 17 Wall., 357.

In the Horst case the Court say, p. 295:

"A person taking a cattle train is entitled to demand the highest possible degree of care and diligence, regardless of the kind of train he takes."

"Such is the rule of care and diligence laid down by this Court in three adjudications where the action was against a carrier of persons. The first was *The Philadelphia & Reading R. R. Co.* v. *Derby*, 14 How., 486. The plaintiff was travelling gratuitously on a passenger train. It was said: 'Where carriers undertake to convey passengers by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence.' . . . . "Any negligence in such case may well deserve the highest epithet of gross.' The next was *The Steamboat New World* v. *King*, 16 How., 469. That was the case of a free passenger carried on a steamer, and injured by the explosion of a boiler. Referring to the rule laid down in the prior case, the Court said: 'We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law.' The last case was *The New York Central R. R. Co.* v. *Lockwood*, 17 Wall., 357. That was a case, like this, of a passenger accompanying his cattle on a freight train. It was there said: 'The highest degree of carefulness and diligence is expressly exacted.' This is conclusive as authority upon the subject. But, upon principle, why should not the law be so in this case? Life and limb are as valuable, and there is the same right to safety, in the caboose as in the palace car. The same formidable power gives the traction in both cases. The rule is uniformly applied to passenger trains. The same considerations apply to freight trains; the same dangers are common to both. Such care and diligence are as effectual and as important upon the latter as upon the former, and not more difficult to exercise. There is no reason, in the nature of things, why the passenger should not be as safe on one as the other. With proper vigilance on the part of the carrier, he is so. The passenger has no authority upon either, except as to the personal care of himself. The conductor is the animating and controlling spirit of the mechanism employed. The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience, and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it."

In the leading case of *R. R.* v. *Derby*, 14 How., 293, the injured man was riding on the locomotive. Yet he was held a passenger of a common carrier entitled to the highest degree of care.

Many persons travel by rail in private cars, owned by them or rented to them by the railroad companies or lent them by private owners. The railroad companies in whose trains these cars are

transported receive pay therefor. But no one has ever been heard to assert that if a railroad company accepts pay for transporting persons in such a private car a release may be taken from liability for its negligence.

The special car, therefore, being a mere circumstance, an "accident of his situation," as it is styled in *Ry.* v. *Derby*, 14 How., 293, without legal significance or consequence in this case it will be seen that the relations of the express messenger and the railroad company in the case at bar, and those of the inventor and the railroad company in the case of *Ry. Co.* v. *Stevens*, 95 U. S., 655, where the stipulation for release was held void, are precisely the same. There is no distinction that we can discern. In both cases the railroad company could have declined to make the particular contract to which the passengers' journey was incidental.

In both cases the railroad company expressed its unwillingness to accept the person as an ordinary passenger for hire by exacting a release from liability for negligence and in no other way.

III.

Railroad Company the Common Carrier of the Messenger.

Counsel persistently confuses the relations of the parties to these contracts. He says: The railroad company is not a common carrier of express companies; therefore it is not a common carrier of the express matter; therefore it is not a common carrier of the messenger.

There is no such legal or logical connection between these propositions. It may be true that the railroad company is not a common carrier of express companies. It is not true, nor does it follow, that it is not a common carrier of the express matter, as we shall presently show. But even if it were true that the railroad company is not a common carrier of the express matter, for the reason assigned by counsel, that because the express company is a common carrier of the express matter, and there can be but one common carrier's liability, yet it is inconsequent to the point of absurdity to say that *therefore* the railroad company is

not the common carrier of the messenger. Even if it were true that, as to the goods, public policy is satisfied with the single liability of the express company as common carrier of the goods, yet the express company is *not* the common carrier of the messenger, and is under no liability at all to him. The express company is not a common carrier of passengers. The express messenger is like anybody else's messenger—an employe whose fare is paid on the public conveyances by which he is obliged, from the nature of his mission, to travel. The railroad company is the only common carrier of the messenger. The express company merely pays the messenger's fare on the passenger train in order that he may accompany the parcels for their greater safety and transact at destination such other business as his employer may have entrusted to him. If, fearing a robbery, the express company had employed a detective to travel on the passenger train in the smoking car with other passengers, the relation of such a detective to the railroad company as its passenger would be the same as that of the express messenger whom he reinforces, except for the casual nature of his employment. The very nature of the express business requires that the property be carried on passenger trains in charge of a messenger and such guards from time to time as will insure its safety. *Holliday* v. *Kennard*, 12 Wall., 258. It would be negligence on the part of the express company not to send extra guards, if need were, and the railroad company could not refuse to carry them any more than it could refuse any other passengers. Nor if it exacted a release would the release be valid.

In *Bank* v. *Express Co.*, 93 U. S., p. 177, the Court thus describes the express business:

"The defendants are express companies engaged in the business of carrying for hire money, goods and parcels from one locality to another. In the transaction of their business, they employ the railroads, steamboats and *other public conveyances of the country*. These conveyances are not owned by them, nor are they subject to their control any more than they are to the control of *other transporters or passengers*. The packages entrusted to their care are at all times when on these public conveyances in the charge of one of their own messengers or agents."

IV. .

The Railroad Company the Common Carrier of the Express Freight.

The law appears to be, however, that while the express company is a common carrier of the parcels for the shipper, and while the railroad company is a subordinate carrier for the express company, yet the railroad company is liable to the shipper as a common carrier for loss of the goods carried for the express company, even where the railroad company and the express company agree that the express company shall be solely liable, of which agreement the shipper is notified.

In *New Jersey Steam. Co.* v. *Merchants Bank*, 6 How., 343, the steamboat company was sued for loss of specie which it was carrying for an express company under such an agreement. The Court say, p. 382:

"The next question is as to the duties and liabilities of the respondents as carriers. . . . . The general liability of the carrier independently of an agreement is familiar. He is chargeable as an insurer of the goods. . . . . The liability of the respondents, therefore, would be undoubted, were it not for the special agreement under which the goods were shipped.

"The question is, to what extent has the agreement qualified the common law liability.

"We lay out of the case the notices published by the respondents seeking to limit their responsibility because—

"1. The carrier can not in this way exonerate himself from duties which the law has annexed to his employment; and,

"2. The special agreement with Harnden is quite as comprehensive in restricting their obligation as any of the published notices."

The Court proceed throughout on the theory that the steamboat company in carrying out its contract for the expressman was liable to the owner of the goods as a common carrier. They say, p. 725:

"The last case (*Sanderson* v. *Lamberton*, 6 Binney, 129) is like the one before us. It was an action by the owners directly upon the sub-contract made by the first with the second carrier in whose hands they were lost."

Sanderson v. *Lamberton* was a case where the first of two connecting carriers had delivered to the second carrier certain goods

for the transportation of which through to their destination the first carrier had contracted with the shipper. The relation of a railroad company to express freight carried on its line is, therefore, not analogous merely, but identical with its relation as a connecting carrier to freight carried on its line for which an initial railroad carrier has issued a through bill of lading. As such connecting carrier it is liable to the shipper as a common carrier of the goods, although it is not a common carrier of the initial line, nor compellable at common law as a common carrier to participate, in the capacity of a subordinate or sub-contractor to the initial carrier, in carrying such through shipment.

In this early case the judgment of this Court was that the carrier employed by the express company was liable as a common carrier tothe owner of the goods, who had delivered them to the express company for carriage to destination, and this strikes at the very root of counsel's contention (Brief, p. 19) that because the railroad company in the case at bar was not a common carrier of express companies, that it was therefore not a common carrier of the goods handled for the express company, and that the messenger was not its passenger.

The railroad company is not a subordinate carrier of the express messenger. It is the sole carrier of the messenger. The express company carries the goods, but it does not carry the messenger. It pays the fare of the messenger on the passenger train, and the messenger occupies that part of the train in which the railroad company, for the mutual convenience of itself and the express company, sees fit to place him. Sometimes the railroad company places the messenger in the regular passenger coach, sometimes in a "combination" car devoted partly to passengers and partly to baggage, sometimes in a part of the mail or postal car, and sometimes when the magnitude of the business justifies the additional space, the messenger, still in charge of the parcels, occupies an express car set apart for that business. But his relation to the railroad company does not change with the amount of space accorded him on the train. When Harnden inaugurated the business and in person carried the bank drafts, parcels and specie in a satchel, traveling on a steamboat or railroad

train without requiring more space than any other passenger occupied, the relations of the messenger to the goods carried and to the public carrier by whose vehicle he engaged transportation were created and arose. These relations remained the same when the parcels became larger and the space allotted by the railroad company for his accommodation was increased to correspond.

It is thus seen that the considerations which counsel urge as determining the relation of the railroad company to the express *messenger* are only pertinent to the relations between the railroad company and the express *company*. The real question is not as in the *Express Cases*, whether the railroad company can be compelled to enter into a contract to furnish special facilities to an express company, but whether in making such a contract, the right to personal safety of a messenger carried for hire as an incident to such contract may be bargained away, so as to deprive the messenger of redress if he be injured by negligence of the railroad company. The solution of this question neither depends upon nor is aided by a consideration of the relation of the railroad company to one of several competing express companies. If as a consequence of that relation the railroad company undertakes to carry a passenger for hire the status and rights of the passenger for hire are fixed not by the contract but by the rules of law.

V.

The Express Cases.

If the above deductions are sound, it will be unnecessary to discuss the question whether the express business is a public duty which railroad companies are bound to perform; which was strongly intimated by this Court in the *Express Cases*, 117 U. S., 1, but as the argument of counsel is based upon an erroneous conception of the decision of this Court in the *Express Cases*, which error finds expression also in the case cited by him, *Ry.* v. *Keefer*, 146 Ind., 21, we submit a review of that decision.

The *Express Cases* constitute one of a group of three in each of which the *ratio decidendi* is the same. These three cases are:

Atchison Ry. Co. v. *Denver Ry. Co.*, 110 U. S., 673.
Pullman Co. v. *Mo. Pac. Ry. Co.*, 115 U. S., 587.
The Express Cases, 117 U. S., 1.

In each case of this series the aid of a court of equity was sought to compel a railroad company to enter into business relations with the complainant on the ground that there was a public duty resting upon the railroad company to do that kind of business. The Court refused. Without questioning the duty of the railroad company to the public to do such business, the Court held that it was of no importance to the public by what agency the railroad company performed the duty.

In the first case, *Atchison Ry. Co.* v. *Denver Ry. Co.*,

"The general purpose of the suit was to compel the Atchison, Topeka & Santa Fe Company to unite at Pueblo with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road with the same privilege as to exchange of business, division of rates, sale of tickets, issue of bills of lading and interchange of cars that were or might be customary with connecting roads or that were or might be granted to the Denver & Rio Grande Railroad Company, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo or to any other railroad competing with the Denver & New Orleans for Denver business."

The Court say (foot p. 682) that to hold under these circumstances the Denver & New Orleans Company was entitled to the relief sought

"would be in effect to declare that every railroad company which forces a connection of its road with that of another has a right to require the company with which it so connects to do a connecting business at the junction if it does a similar business with another company under any other circumstances,"

which the Court held was not the law.

This decision recognized the rule that a railway company, although a common carrier of goods and passengers, could not be compelled to extend to all connecting carriers the same facilities on the same terms. If the railroad company, in discharging its public duty as a common carrier, saw fit to employ or be employed by one agency rather than another in doing a through business, it might do so to the exclusion of other common carrier agencies. But it is manifest that this privilege of declining to render through service for a common carrier is no measure of its right to stipulate for immunity from liability for negligently

injuring the freight or persons that, in pursuance of such arrangement for through shipment, are actually carried by the railroad company. It would be no answer to a suit by a shipper for loss of his goods, or to a drover for personal injury, for a railroad company to say that as it was not obliged to carry him for the initial carrier, which had contracted for his transportation, it had the right, if it did consent to carry him, to stipulate for a release from liability for negligence. Such contention was made and repudiated in *Ry. Co.* v. *Ashley*, 67 Fed., 209; 28 U. S. App., 375.

The next case was that of *Pullman Co.* v. *Ry. Co.*, 115 U. S., 587. The Pullman company invoked the chancery powers of the Court to compel the railway company to haul Pullman sleeping cars. One ground urged was—

"That it has become indispensable in the conduct of the business of a railroad company to run on passenger trains, sleeping and drawing room cars with the conveniences usually afforded by such cars for night travel."

The Court said:

"This may be true, but it by no means follows that the railway company is in law obliged to arrange with the Pullman company for such accommodations."

The ruling is on the same ground as in the Atchison case—that while it may be the duty of the railway company to haul cars for the public accommodation, yet it is under no duty to elect one agency rather than another through which to perform such public duty.

Here again it is manifest that the right of a railroad company to refuse to haul Pullman sleepers is no measure of its right to stipulate for release from liability for negligently injuring a person carried on the Pullman car, whether such person be the president, traveling auditor, detective or other employe of the Pullman company whose right to travel free on the car might grow out of the contract between the railroad company and the Pullman Company.

The next in series was the *Express Cases*, 117 U. S., 1. In each of these the aid of a court of equity was sought by express companies to compel a railroad company to furnish facilities on

its trains and do an express business with them on the same terms and in the same way that the railroad company "accorded to any other company engaged in conducting an express business on its line."

The Court said that this would be to make (p. 29):

"An arrangement for the business intercourse of these companies such as, in the opinion of the Court, they ought to have made for themselves, and that as was said, in *Atchison Ry. Co.* v. *Denver Ry. Co.*, 110 U. S., 667, followed at this term in *Pullman Palace Car Co.* v. *Missouri Pac. Ry. Co.*, 115 U. S., 587, could not be done."

To the misapprehension of the question decided in the *Express Cases* is due much of the error that appears in the decisions relied on by our adversaries as authorities. The *Express Cases* recognize to the fullest extent the public duty of a railroad company as a common carrier to do or permit to be done an express business over its line, but hold that this duty is performed when a railroad company furnishes to one express company, even to the exclusion of others, the necessary facilities for such express business. There is in the *Express Cases* no negation, express or implied, but rather a recognition of the truth of the proposition that the railroad company is a common carrier of the express packages and of the passenger who accompanies them. The negation in the *Express Cases* goes merely to the proposition that the railroad company is a common carrier of *express companies* as well as of express matter and messengers. The Court intimate that the railroad company is not a common carrier of common carriers, but it is as erroneous to infer therefrom that the railroad company is not a common carrier of the goods and persons accompanying them as it would be to infer from the Atchison case that a railroad company which receives from an initial carrier a car containing a through shipment of stock with a drover in charge was not a common carrier of the car load of stock and the man in charge.

And it would seem manifestly absurd to say that if the drover in charge of the cattle tendered by the initial carrier were an employe of the initial carrier the release would be valid, while if he were an employe of the owner of the stock the release would be void. Yet such is the effect of the argument pressed by counsel for plaintiff in error.

It is, therefore, a *non sequitur* to argue that because the railroad company is not compellable to enter into business relations with an express company it may attach to its consent to do such business a stipulation that the messenger shall be carried without liability for negligently injuring him. The duty to enter into contractual relations with the express company is no measure of the duty of the railroad company to safely carry a messenger or other employe whose fare is included in the contract price.

That this is true is shown by the reasoning of the Court in *Ry. Co.* v. *Stevens*, 95 U. S., 655, where as an incident to a proposed contract for the use of a patented car-coupling, the inventor was given passage on the company's train under an express stipulation that the acceptance of such transportation should impose no liability on the railway company for negligently injuring him. While being so carried as an incident to such private contract he was injured, and the Court held the stipulation against liability for negligence was void.

We submit, therefore, that the ruling of this Court in the "Express Cases" in no way justifies, but, when critically considered, repels the inferences therefrom upon which the decisions cited by counsel are based; and that the duty of the railroad company to competing express companies is no measure of its duty to the owners of the goods or to the messenger, which it carries, or of its duty to the public to carry express matter and messengers.

VI.

The Duty of the Railroad Company to Carry Express Goods and Messengers.

In counsel's reply brief, at page 3, he characterizes as "an admission of the highest importance" the statement in our original brief that the railroad company is not bound to enter into a contract with a particular express company for the carriage of express matter. Counsel entirely mistakes us if he understands the language used by us to concede more than that, railroad company, if it chooses to do the express business itself, may refuse to contract to furnish an express company with special facilities on its trains. We contend, both here

and in our original brief, that this Court, in the *Express Cases*, plainly stated that the railroad company is under a public duty to carry express matter and messengers on its trains, and is therefore *by law* obliged to perform this duty, and we quite agree with learned counsel in saying (Reply Brief, p. 3) that "in such case it would be difficult to see how a railroad company could carry such messenger on any other terms than as a passenger."

To make clear our position, even at the risk of slight repetition, we quote from the *Express Cases* (p. 20) the language of the Court dealing with the obligation of the railroad company to carry express matter and messengers as a public duty imposed by law :

"The express business has become a public necessity, and ranks in importance with the mails and the telegraph. It is used in almost every conceivable way and for almost every conceivable purpose by the people and by the Government."

And on page 21:

"Every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter." . . . .

And on page 24:

"The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

It is clear then, that in carrying express matter and messengers, the railroad company is discharging a public function and a duty to the public as a public or common carrier.

It is as much its duty, so far as the owners of the packages are concerned, to carry these packages in charge of a suitable messenger on its passenger trains as it is to transport freight and passengers.

It operates and was incorporated to operate the public conveyances and the public highway upon which the express business

must be done. Upon these public conveyances the railroad company agrees to transport the express company's messenger for an agreed compensation. It is essential in sending valuable freight by messenger that he shall travel on passenger conveyances in order that, besides guarding the property on the journey, he may also transact the express company's business at destination. The messenger travels precisely as any one might who should be sent by his employer on a journey in charge of valuable property with duties to perform in regard to the property at the point of arrival.

The fact that his employer chances to be an important company, itself doing a common carrier business, does not alter the messenger's relation to the journey or to the property he protects, or to the public carrier by whose conveyance he is transported.

In the inception of this business Harnden, the originator of the enterprise, himself traveled as a public express, carrying the bank drafts, jewelry and other valuable parcels in his satchel. He took passage on whatever conveyance best suited his purpose. And when the frequency and regularity of his journeys necessitated special provision and facilities at a monthly or season rate of compensation, his relation to the transporting companies was still that of a passenger of a common carrier, and there was never any doubt that the railroad company was obliged to carry him.

Counsel (Brief, p. 23) quote Harnden's original advertisement that he would "run a car through from Boston to New York," and intimate that the business was so begun. But we find, on investigation, that this is an error. In his "History of the Express Business," Mr. Stimson, after quoting Harnden's original advertisement in full, states, p. 34:

"The 'extra car' was a little play of fancy, an ordinary valise serving to hold all that the original expressman, Harnden, had to carry for several months afterward. The identical valise is now in the possession of Benjamin P. Cheney, Esq., at Cheney & Co.'s express office in Court Square, Boston. During the first two or three months Harnden served as his own messenger and was upon the Sound nearly every night in the week."

The same statement is made in the Encyc. Brit., Am., Supp., Vol. II, title, "Express," as follows:

"Harnden himself was the messenger and carried his packages at first in a small handbag, afterwards in a stout trunk."

So also with the Wells Fargo Express, founded in 1841 by Henry Wells. Mr. Stimson states, "Hist. Express Business," p. 61:

"Wells acted as his own messenger for about eighteen months. In every instance he paid his fare, and for extra baggage, like any other passenger—say $15.00 from Albany to Buffalo. In 1842 he carried all his valuable parcels in a carpet bag. In 1843 the trips were made daily and one large trunk served to hold all his freight."

The legal relations of the parties have undergone no change since that date. The business has expanded, but its nature has not altered. The seat provided for Harnden or Wells by the railroad company has become a special car, the satchel full of parcels has been superseded by an iron safe, and whatever else of crates or car space the development of the business has made it profitable to devote to the purpose. But always from the beginning until now the essential elements have been that the expressman, as a passenger for hire carrying valuable parcels, is transported on the public passenger conveyances for the sake of speed and security.

VII.

Reasons Given by Counsel why Express Messenger is not a Passenger do not Bear Analysis.

Counsel says (Brief, p. 13):

"The object for which one contracts to use a car is the criterion which determines whether he is or is not a passenger."

Let us apply this criterion: Counsel concedes that a postal clerk is a passenger. The object for which an express messenger uses the car is to accompany and care for valuable property *en route* to its destination, there to do with it what the business requires, cash drafts, make collections, collect charges, etc. The object for which a drover uses a car is identically the same—to accompany and care for the property en route. Yet counsel concedes that a drover as well as a postal clerk is a passenger; so tested by the very criterion that counsel himself sets up, an express messenger is a passenger to the same extent as a postal clerk or a drover.

In his reply brief counsel again attempts to state the reasons why the express messenger is not a passenger. He says (p. 6):

"The reason why the relation of passenger and common carrier did not exist between the messenger and the railroad company is because the messenger had no right upon the train except by the consent of the railroad company, and that because of the purpose for which he desired to be upon the train, a purpose different from that for which the rest of the public desired to use the train and a purpose different from that for which the train was provided."

All of this language and each of these reasons are equally applicable to a postal clerk and a drover, between whom and the railroad company the relation of passenger and common carrier does exist as counsel concedes.

Counsel virtually admits this when (Reply Brief, p. 5) he concedes that the only "distinction between an express messenger and a postal clerk rests in the fact that the express messenger has released the railroad company from all liability;" but on the same page he cites a case, *Commonwealth* v. *Railroad Co.*, 108 Mass., 7, where a popcorn seller on the train was held a passenger of a common carrier, although he had "released the railroad company from all liability" and although he "had no right upon the train except by the consent of the railroad company, and this because of the purpose for which he desired to be upon the train, a purpose different from that for which the rest of the public desired to use the train and a purpose different from that for which the train was provided."

Here at last he finds a case which contains all the crucial elements which, he contends, deprive the person carried of his relation to the common carrier as its passenger, and yet in that case the Court holds that the relation exists.

Counsel also quotes from the *Quimby* case, 150 Mass., 365, in which it was held that a carrier may, in issuing a pass to a free passenger, lawfully exempt itself from liability for negligence, and as it is upon the principle of this case that the Massachusetts Court held later in the Bates and Hosmer cases that the grant of the free privilege of using the baggage car to expressmen who had paid their fare validated the release, we refer to the following cases in which it has been held that stipulations in a free pass against liability for negligence of the railroad company are void.

In the case of *Jacobus* v. *R. R. Co.*, 20 Minn., 125, the Court say (p. 128):

"The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers and holds him liable for the slightest neglect. For like reasons the same extreme care is required, though the passemger be carried gratuitously, having undertaken to carry, the duty arises to carry safely.

"There are two distinct considerations upon which the stringent rule of liability for injuries to passengers rests. One is a regard for the safety of the passengers on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriae*, has in protecting the lives and limbs of its subjects (p. 129).

"So far as the consideration of public policy is concerned, it can not be overridden by any stipulation of parties to the contract of passenger carriage. No stipulation of the parties in disregard of it or involving its sacrifice in any degree can be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same (p. 130).

"It is said, however, that it is unreasonable to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers because there may be a few on board for whom they are not responsible. In the first place, if this consideration were allowed to prevail it would prove too much, for it could be urged with equal force and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire (p. 130).

"It may be that, on a given occasion, the gratuitous passenger or the passenger upon a free pass is the only person injured, as, for aught that appears, was the fact in this instance, or is the only party who will proceed against the carrier, the only person who will practically enforce upon the carrier the importance of the faithful discharge of his duty (p. 131).

"As to the plaintiff being in the baggage car, his presence would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there, under such circumstances, would render it the duty of the company, in view of the fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury" (p. 134).

Counsel says (Brief, p. 6) that our contention would create a new class of passengers—passengers in law or passengers *in in-*

vitum. On the contrary, we are resisting the creation of a new class of passengers, an anomalous class who, because their business requires them to travel for the public, would be without any rights that the railroad companies are bound to respect. As to its employes the railroad company may not contract for immunity in negligently injuring them. As to its ordinary passengers the same disability exists. But the army of express agents who, to the number of ten thousand, travel daily on the various public conveyances of the country are, it is contended, a new class of passengers, whose fare is accepted by the public carriers, but towards whom the carrier has absolved itself from the duty of care for their safety, passengers from whom it has bought the right to be negligent even to manslaughter.

That such messengers are not licensees is shown by the decision of this Court in *Bennett* v. *Ry. Co.*, 102 U. S., 584. The Court say :

" The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

And if counsel's contention is sustained this new class of passengers, to whom the former owes no duty of care, will not be limited to express messengers alone. Already it is a common practice among railroads to require from those numerous persons who travel on freight trains a release from liability for negligence. It may be as plausibly claimed that inasmuch as the carrier has the right to refuse to carry passengers on freight trains such release would be valid. So, also, the multitude of persons who travel in special cars or charter excursion trains may, with equal reason, be deprived of their remedy against negligent injury. So also persons traveling with property shipped by fast freight lines, of which lines there are thirty-one in Cincinnati.

Counsel urges that the consent of the messenger to this contract in some manner gives it validity ; that if he consented to a contract depriving him of his remedy against negligent injury it is against public policy to disregard such consent. To this it is only necessary to say that the power to make a contract is, like all other powers, susceptible of abuse. Against such abuse the

law protects the citizen. A man in distress may not lawfully sell himself into slavery, may not lawfully agree to pay exorbitant usury, may not lawfully agree to refrain from business or marriage or agree to do anything or submit to anything *contra bonos mores* or against the law. He may not, for the sake of employment, agree not to hold his employer liable for negligently injuring him, or for the consequences of a breach of the law by his employer.

In *Coppell* v. *Hall*, 7 Wall., at p. 558, the Court say in reference to a defense that the contract sued on was against public policy:

"In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but for the law itself. The principle is indispensable to its administration. Whenever the illegality appears, the disclosure is fatal. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons."

Counsel closes his brief by insisting "that the railway company stands in the exact relation of one hauling or *towing* an express car."

That this is an erroneous view is shown by the opinion of this Court in *Hannibal Ry. Co.* v. *Swift*, 12 Wall., 262. In that case a car filled with baggage and other property, in charge of a guard for its protection, was hauled by the railroad company in its passenger train. The property was burned while in transit. It was contended that the relation of the railroad company to this shipment was not that of a common carrier.

The Court say, page 272:

"The case of *Mallory* v. *The Tioga Railroad Company*, 39 Barbour, 488, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them, yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The Court did not consider the fact that the property was transported in the cars of the plaintiff, and that the cars were loaded and unloaded by him, affected, in any respect, the liability of the company, the entire train in which the cars were moved being, whilst on the route, under the control and management of its servants and employes.

"In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. . . . . If it were admitted that a special guard was appointed for the car on the route the admission would not aid the company in relieving it of liability. The control and management of the car or of the train, by the servants and employes of the company, were not impeded or interfered with, and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety."

Inasmuch as the question submitted by the Circuit Court of Appeals necessarily brings up for consideration the contracts of release under which the railroad company claims exemption from liability for negligently injuring the express messenger, it is proper to call attention to authorities which hold broadly that no contract or consent whereby one person stipulates for immunity in unlawfully or negligently injuring another is valid.

Public policy forbids one to contract for immunity, whether from civil or criminal liability, in a wrongful act causing death or injury to a human being. Such an act is forbidden by law. The sanctions are the penalties for manslaughter and the liability to civil action for wrongful death or injury. The Federal courts and most of the state courts have uniformly held invalid stipulations for exemption from civil liability for such wrongful act. The safety to human life and limb which the policy of the law aims to secure from wrongful injury is not permitted by the law to be the subject of barter and sale. *Thompson on Negligence*, p. 1035.

In the case of *Railroad* v. *Spangler*, 44 O. S., 471, it was held:

"That the liability of railroad companies for injuries caused their servants by the carelessness of other employes who were placed in authority and control over them is founded upon considerations of public policy, and it is not competent for the railroad company to stipulate with its employes at the time and as a part of their contract of employment that such liability shall not attach to it." See page 478.

In the case of *L. & N. R. R. Co.* v. *Orr*, 91 Ala., 548, the Court say, p. 554:

"Railroads, like other corporations and persons, have the right to adopt reasonable rules and regulations for the government of their employes and for their own protection, but they can not stipulate for immunity from liability for their own wrongful negligence. A rule which imposes upon the employe to look after and be responsible for his own safety contravenes the law itself which fixes the liability of railroads for negligence, causing injury or death to their employes."

So, also, *R. R. Co.* v. *Jones*, 92 Ala., 218; *Hissong* v. *R. & D. R. R. Co.*, 91 Ala., 514, and *Ry. Co.* v. *Eubanks*, 48 Ark., 460.

In the case of *Johnson* v. *R. R. Co.*, 86 Va., 975, it was held that:

"A contract whereby a party stipulates for exemption from liability for the consequences of his own negligence is against public policy and void."

In this case plaintiff's intestate was a quarryman engaged in getting out rock along a railroad, and while so engaged was struck by a passing train and killed. In the contract with the company, whereby the firm obtained the right to quarry on its premises, it was stipulated that the company should "in no way be held responsible for any injuries to or death of any of the members of the firm or any of its agents or employes should such death or injury occur from any cause whatever. And in the event of suit being brought or any judgment being obtained against the railroad company, then the quarry lessees agreed that they would resist the suit and pay any judgment with costs." The trial court held this stipulation valid. The Supreme Court reversed.

In *Purdy* v. *Ry. Co.*, 125 N. Y., 212, the Court, in touching upon the question, consider the principle of public policy applies to any employer and not solely to railroad corporations.

In *Hartford Ins. Co.* v. *Ry. Co.*, 70 Fed. Rep., 201, the Court enforce the distinction between an injury to property and an injury to person, and show how and why a contract by a railroad company as a carrier for exemption in injuring a passenger, or as an employer for exemption in injuring its employes, is illegal and void, while a contract for immunity for setting fire to a building on the right of way is valid. If the owner chooses to yield it to the company, it may acquire the right to burn the building or to cast upon the owner the duty of protecting it against

fire, and it is no contract for permission to do a wrong but to exercise a right. A man may sell to another the right to burn or destroy his building, but he can not sell the right to kill or wrongfully injure him any more than he can sell himself into slavery. A carrier can not acquire the right to be negligent so as to injure a passenger, nor can an employer so as to injure his employes. A manufacturer may not contract with his factory girls that he shall not be held liable if they are injured by his failure to provide fire escapes as required by law.

In elucidating this the Court say that a contract by a railroad company with its employes stipulating for release from liability for negligence is void because it is an attempt to escape from the duty which the law imposes upon it.

"To exercise ordinary care to furnish them with a reasonably safe place to render their services and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interest because it endangers the life and limbs of citizens, which are of the highest value to the state and nation. A contract which exempts it from negligence in the discharge of these duties is void because it relieves it of an absolute duty which the law imposes upon it and because it unreasonably endangers the lives of employes."

But that a contract leasing a site for a building and stipulating for immunity for negligently firing the building does not relieve it from the discharge of any duty to the public or *to any citizen* that the law imposes upon it.

We find nothing in the opinion of this Court recently delivered in this case at variance with these views.

The same rule applies to such contracts by employers other than railroad companies. In *Roessner* v. *Herman*, 8 Fed. Rep., 782, the Court (Judge Gresham) held:

"The substance of the complaint is that defendant's machinery was defective and unsafe; that while operating the same, with reasonable care and without knowledge of its defective character, the deceased received injuries which caused his death, and that the defendant knew of the character of the machinery, or, with proper diligence, might have known it. So far as he could do so by the exercise of reasonable care, the defendant was bound to supply his factory with suitable and safe machinery. If he failed to do this and required his employe to operate machinery which

was unsound and unsafe, and in doing so the latter, while exercising ordinary care and prudence, received injuries which caused his death, his personal representative has the right of action for the benefit of those who have sustained losses from the injury and death. When the defendant's negligence in supplying his employes with unsafe machinery has caused the death of the latter, the law will not allow the defendant to say, as in effect he does say in this answer: 'It is true that my machinery was defective and unsafe and my negligence caused the death of my employe, but I am not liable to those who have suffered from the loss of his life, because I had a contract with my employe which secured me the right to supply with defective and unsafe machinery and to be negligent.' Such a contract is void as against public policy. If there was no negligence, the defendant needed no contract to exempt him from liability. If he was negligent the contract set out in his answer would be of no avail."

In *Miller* v. *R. R. Co.*, 65 Fed. Rep., 305 (affirmed, 76 Fed. Rep., 440), the Court say, p. 308:

"It was long ago wisely held that an employer can not relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action."

The agreement pleaded in the case at bar is the equivalent of a consent on the part of the messenger that the railway company may unlawfully wound him or destroy his life. Such a consent is no bar to his action.

In *Barholt* v. *Wright*, 45 O. S., 177, an action to recover damages for personal injuries inflicted upon plaintiff in a fight, the defense was that the parties fought by consent. The Court say, p. 179:

"As often as the question has been presented it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat as well as in a combat when the plaintiff was the first assailant and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace, *as well as to the life and person of the citizen.* From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten than it does an agreement to part with his liberty and to become the slave of another."

In *Miller* v. *Bayer*, 94 Wisc., 123, it was held that consent on the part of a female to the commission of the crime of abortion upon her is no bar to civil action by her to recover damages for personal injuries inflicted upon her by the abortion.

Suppose an apothecary agreed to allow certain of his customers a discount on all purchases if they would release him from liability for negligence, could he in a civil action for carelessly poisoning one of them plead such a contract for release?

Counsel have argued that this rule is at variance with the doctrine of assumption of risk, where a servant who knowingly uses a dangerous appliance as a part of his contract of employment is held to agree that his master shall not be liable for an injury inflicted thereby. But an examination of the principle upon which this doctrine rests shows that it is not a contract against liability for negligence, for the master is not guilty of negligence in not providing a different appliance, if the servant, with full knowledge and without complaint, consents to use the appliance provided.

Narramore v. R*y. Co.*, 96 Fed. Rep., 298.

So far as we have been able to ascertain there is no case in which a contract stipulating for immunity in negligently causing personal injury or death has ever been upheld. In some states, it is true, a party may contract for exemption from liability, not for his personal negligence, but for that of his employes. In the case at bar the negligence charged related to the personal duty of the company and its breach was manslaughter under the laws of Ohio, where the accident occurred. To contend for the validity of the contracts of release pleaded here is to claim that immunity in committing a crime may be contracted for and that such a contract will be recognized and enforced in a court of law.

In *Pope Co.* v. *Gormully*, 144 U. S., 224, 233, the Court say:

"There are certain fundamental rights which no man can barter away, such for instance as his right to life and personal freedom."

In that case mere property rights were involved. In the case at bar the right to redress for personal injury and death itself is the subject matter of the contract which plaintiff in error seeks

to enforce, as well as the right of a passenger to safely travel the public highway by the public conveyance.

Laying aside for the moment the latter right we submit that it is well established that the public policy of Ohio renders void a contract stipulating for immunity in or implying assent to injury affecting the life or health of the citizen. So that even if the contract in the case at bar were to be treated as a contract for private carriage, and therefore involving no question of general mercantile law, it would still be obnoxious to the public policy of Ohio, which invalidates such contract, not on commercial principles, but as attempts to buy and sell the right of the citizen to personal safety. While some of the Ohio cases to this effect are common carrier cases, yet the principle of public policy which the Court invoke is that of the interest of the state in the life and personal safety of the citizen.

R. R. v. *Spangler*, 44 O. S., 471.
Barholt v. *Wright*, 45 O. S., 177.

In *R. R. Co.* v. *Curran*, 19 O. S., 1, the Court say :

"It is true, that common carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry ; but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods, applies with still greater force in the case of passengers.

"The *common law has a peculiar regard for human life ; and for this reason* exacts a greater degree of care in respect to it than in relation to any matter of mere property.

"Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care.

"This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers.

"In the case of the *Philadelphia & Reading Railroad Company* v. *Derby* (14 How. R., 486), it was laid down that, 'when carriers

undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety, require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross." And in delivering the opinion in the case of the steamboat *New World et al* v. *King* (16 How. R., 474), Mr. Justice Curtis declared that the Court desired to be understood as reaffirming "that doctrine, as resting, not only on public policy, but on sound principles of law.'"

As was said by Mr. Justice Woodbury, in *New Jersey Steam. Co.* v. *Bank*, 6 How., 427, in considering an immunity claimed under a similar contract between an express company and a subordinate carrier:

"It is imperative in cases of vessels devoted to both freight and passengers to hold the owners and their servants responsible for the exercise of every kind of diligence, watchfulness and skill which the principles of law may warrant. . . . . To relax the legal obligations and duties where such neglect, followed by death, is a crime and punishable at least as manslaughter, would be unfaithfulness to the spirit of such legislation and to the loudest demands of public policy."

All of which is respecffully submitted.

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APPENDIX.

Opinion of Judge William H. Taft, C. J.

United States Circuit Court, Southern District of Ohio, Western Division.

William Voigt vs B. & O. S. W. Ry. Co.

TAFT, Circuit Judge.

It seems to be well settled that an express messenger, though carried in a special car, when carried under a contract with a railroad company made by the express company for the transportation of express matter in his charge, is a passenger for hire.

Fordyce v. Jackson, 56 Ark., 594; Blair v. R. R. Co., 66 N. Y., 313; Brewer v. R. R. Co., 124 N. Y., 59; Kenney v. R. R. Co., 125 N. Y., 422; Woodworth v. R. R. Co., 26 O. S., 585; Thomas v. R. R. Co., 79 Ky., 169; Jones v. R. R. Co., 125 Mo., 666; Jennings v. R. R. Co., 38 U. C., Q. B., 15 Ont. App., 477; Yeomans v. Co., 44 Cal., 71; Ketcham v. R. R. Co., 133 Ind., 346; Chamberlain v. R. R. Co., 11 Wisc, 238; R. R. Co. v. Wilson, 79 Texas, 371.

Postal clerks whose relation to the railroad company is analogous to that of the express messenger are also accorded the same rights as passengers for hire.

Seybolt v. R. R. Co., 95 N. Y., 562; Nolton v. R. R. Co., 15 N. Y., 444; Magoffin v. R. R. Co., 102 Mo., 540; Mellor v. R. R. Co., 105 Mo., 455, 460; Jones v. Ry. Co., 125 Mo., 666; Hammond v. R. R. Co., 6 S. C., 170; Libbey v. R. R. Co., 85 Maine, 34; Kingman v. R. R. Co. (Ky.), 35 S. W., 264; B. & O. R. R. v. State, 72 Md., 36; Gulf Ry. Co. v. Wilson, 79 Texas, 371; Ketcham v. R. R. Co., 133 Ind., 346; Ry. Co. v. Shott (Va.), 22 N. E., 811; Collett v. R. R. Co., 16 Ad. & E. E. S., 984; Arrowsmith v. R. R. Co., 57 Fed. Rep., 165; Gleason v. R. R. Co., 140 U. S., 435.

A passenger for hire is entitled to the highest degree of care and skill from the railroad company in the management of its trains and the preservation of his safety. If the plaintiff was a passenger for hire, then a stipulation by the common carrier whose passenger he was exempting the carrier from responsibility for negligence, or that of its servants, was void according to the unbroken line of authorities in the Supreme Court of the United States.

R. R. Co. v. Lockwood, 17 Wall., 359; Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S., 397; Inman v. South Carolina Ry. Co., 129 U. S., 128–139; Phoenix Ins. Co. v. Erie Transportation Co., 117 U. S., 312–322; Hart v. Pa. R. R., 112 U. S., 331–338; Ry. Co. v. Stevens, 95 U. S., 655; Bank of Ky. v. Adams Express Co., 93 U. S., 174–183; R. R. Co. v. Pratt, 22 Wall., 123, 124; Express Co. v. Caldwell, 21 Wall., 264–268.

In the case at bar, according to the averments of the answer now under consideration, the express company guaranteed the railroad company against any damage to it arising from suits for personal injury by the employes of the express company. By contract between the express company and the plaintiff, the plaintiff agreed to release all right of action which he might have against the railroad company for negligence, and stipulated that his agreement with the express company should enure to the benefit of the railroad company. These two contracts are in effect the same as a contract made directly with the railroad company by the messenger, whereby he agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants. In so far as they have this effect they are void because against public policy. Railroad Company v. Lockwood, 17 Wall., 359. They do not therefore constitute a valid defense to the action of the plaintiff to recover damages for injuries caused by the negligence of the defendant company.

The argument of defendant's counsel against the demurrer may be stated thus: The rule of public policy which renders invalid a stipulation by a common carrier restricting its liability for loss caused by its negligence or that of its servants, applies only to those duties which it is bound to perform as a common carrier.

Whenever that which it engages to do is something which it is not under obligation as a common carrier to do, it has the same freedom of contract as a private carrier for hire, and may therefore exempt itself by stipulation from liability for its own negligence or that of its servants. In the case at bar the defendant company was not under any common law obligation to furnish express facilities to the express company, whose employe the plaintiff was If, then, the express business is not performed by the railroad company as a common carrier, but under special contract, it must be done by it as a private carrier. Hence, the conclusion is said to follow that the messenger was carried by the railroad company as a private carrier under a special contract with the express company, under which the railroad company might lawfully exempt itself from liability arising from negligence of itself or that of its servants. The argument of counsel is sustained by the decision of the Supreme Court of Indiana in the case of Railway Co. v. Keefer, decided in October, 1896, and reported in 44 N. E. Rep., 796. The facts of that case are not to be distinguished from the one presented on this demurrer. With deference to that Court, I find it impossible to follow the reasoning upon which this conclusion is based. It is based upon distinctions supposed to be established by the Supreme Court of the United States in the Express Cases, 117 U. S. 1.

The cases cited in the beginning of this opinion clearly establishes the fact that the relation between the railroad company and the express messenger, where there is no contract exempting the railroad company from liability, is that of a public carrier to a passenger for hire. The Supreme Court of the United States, in the Express Cases in 117 U. S., page 1, did not decide that the express business was not the business of a common carrier. The plain intimation of the opinion of the Court was, that the express business had become such a necessity that it was the duty of a railroad company to furnish express facilities to the public; but the point in judgment was, that a railroad company was not obliged to furnish to an independent express company means for carrying on the express business upon its road. The Court held that the railroad company was not a common carrier of common carriers, and that it sufficiently complied with any obligation

which it was under to the public to furnish to them express facilities if it made a contract with one company to do all the express business upon its road. It follows from that case, that if a railroad company chooses to do its own express business, it may exclude all express companies from its line. The case does not decide that the railroad company, when it contracts to transport the express matter of an express company, is not discharging its duty as a common carrier in offering the public express facilities. It is true that it is under no obligation to carry an express messenger as such. It may stipulate with the express company that it will provide one of its own servants to take charge of the express matter while upon its trains. But when it does carry an express messenger, it is discharging its functions as a common carrier of persons. An express messenger is not a different kind of freight from an ordinary passenger upon its passenger train, except that he travels in a special car provided by the railroad company. He would have the right to demand of the railroad company that he should be carried in the passenger train if he tendered his fare.

If the company, in order to discharge its duty to the public to afford express facilities upon its line, agrees to carry him in a special car in a passenger train, he does not thereby lose his rights and character as a passenger. This may be seen from the ruling of the Supreme Court in an analogous case. A railroad company is a common carrier of cattle. It is under no obligation to carry drovers to attend to the cattle. It may assume this duty itself and provide servants of its own to water and care for the live freight. When it does, however, make a contract allowing a drover to ride upon its cattle train, furnishing, as one of the terms of the contract of affreightment, free transportation for the purpose, he is carried as a passenger for hire by the railroad company, and as a common carrier. The reason is, that the railroad company is bound to carry the drover if he presents himself and pays his fare upon its passenger trains, and if, for any purpose of its own, the railroad company sees fit to allow the drover to ride upon its freight trains, though it is not under any obligation to carry him upon such trains, in doing so it does not lose the character of a common carrier carrying a passenger for hire.

Railroad Company v. Lockwood, 17 Wall., 359. A common carrier is allowed to make any reasonable stipulation restricting its liability to a shipper or to a passenger, and in this wise it may cut down its liability to exactly that to which a private carrier for hire would be subject, but this does not make the common carrier a private carrier, so as to escape the rule of public policy, which forbids the common carrier from stipulating against liability for its own negligence.

If, then, a railroad company, in carrying an express messenger for an express company, is a common or public carrier of a passenger for hire, the railroad company can not by restricting its liability for injury to the messenger, change its character as a common carrier.

In R. R. Co. v. Lockwood, Mr. Justice Bradley, in delivering the opinion of the Supreme Court, used this language:

"It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or persons on modified terms, drops his character and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee, because he has made the contract.

"We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also losses by means of any superior force, and any inevitable accident. Yet the employment is the same in both cases. And if, by special agreement, the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of

inevitable accidents in the carriage of his goods. Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels and a private carrier as to the one?

"On this point there are several authorities which support our view, some of which are noted in the margin.

"A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character."

It is quite true that the railroad company is not obliged to furnish a special car for the express messenger, but when it does so, then it assumes the relation of a common carrier to the messenger carried, because he is one of the public whom the railroad company is bound to carry in some kind of a car. There is no such difference in the risk of carrying the express messenger and the ordinary passenger in the same train, as there is between the risk to the owner of a truck boat in carrying a keg of specie or a load of expensive furniture, and that involved in carrying the produce which he holds himself out to transport.

In Bates v. R. R. Co., 140 Mass., 255, it was held that an express messenger who was riding on a ticket in the baggage car, providing that in consideration of being allowed to ride in the baggage car, the messenger would assume all risks or accident and injuries received by him while so riding was a valid contract exempting the railroad company from an injury received by the messenger through the negligence of the company, and a similar ruling was made in the case of Hosmer v. R. R. Co., 156 Mass., 506. The conclusion of the Court was based on the fact that the

place where the plaintiff was riding was one in which the defendant was not under obligation to carry him. The contract gave him the privilege, which he sought for his own convenience. I think that the Bates case and the Hosmer case are not in accord with the decisions of the Supreme Court of the United States. First, the contracts did not expressly exempt the railroad company from accidents occurring through its own negligence, and yet they were given that effect, which is in conflict with the decision of the Supreme Court in the case of the N. J. Steam Navigation Co. v. The Merchants' Bank, 6 How., 383. Secondly, the cases can not be reconciled with the decision in R. R. Co. v. Lockwood, in which the plaintiff was a drover allowed to ride upon a freight train, a much more dangerous place than the passenger train, to which the railway company might have compelled him to resort had it seen fit to do so, and yet he was still treated as a passenger for hire, who, on grounds of public policy, was not permitted to barter away his right to the highest care and skill of the railway company in his transportation.

There is a class of cases upon which defendant's counsel rely, known as circus cases, the first of which is Coup v. Ry. Co., 66 Mich., 111. This is followed in R. R. Co. v. Wallace, 14 C. C. A., 257, and Robertson v. Ry. Co., 156 Mass., 525. In these cases the contract of the railroad company was with a circus proprietor, by which the railroad company agreed to haul with its locomotive power over its road the train of cars belonging to the circus proprietor and containing the animals and the company of persons engaged in the circus. It was held that the railway company might exempt itself from liability for the negligence of itself and its servants in the hauling of the circus train. Without deciding that, under the rules of public policy enforced in the Federal courts, such a contract could be held valid, it is sufficient to say that the cases are clearly distinguishable from the one at bar. In those cases, the contract of the railway company was not one of carriage ; it was merely one of hauling or towing cars by the locomotives of the railway company. The freight and passengers were not entrusted to the railway company in the manner in which the merchandise and passengers received by a common carrier are entrusted to it. Transportation

Line v. Hope, 95 U. S., 297–300; Bank of Kentucky v. Adams Express Company, 93 U. S., 174–184. The railway company might refuse absolutely to receive the cars of the circus company and to haul them. The railway company did not hold itself out as engaging in the business of hauling or towing.

The demurrer to the second defense of the answer is sustained and the case will stand for trial on the issues made by the other defenses.

Syllabus.

BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY *v.* VOIGT.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 88. Argued December 20, 21, 1899. — Decided February 26, 1900.

The railway company, being engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. Voigt made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to his application, was employed by the express company under a contract in writing signed by him and it, whereby it was agreed between him and the express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be com-

Statement of the Case.

pelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company. *Held*, that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood*, 17 Wall. 357; that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and that such a contract did not contravene public policy.

The following statement and question were certified to this court by the Judges of the Circuit Court of Appeals for the Sixth Circuit:

"This was an action brought by William Voigt, the defendant in error, against the Baltimore and Ohio Southwestern Railway Company, the plaintiff in error, to recover for damages sustained by him in consequence of a collision between two trains of the plaintiff in error, upon one of which, a fast passenger train, he was riding at the time of the accident. He was an express messenger riding in a car which was set apart for the use of the United States Express Company, and occupied by that company for its purposes under a contract between the express company and the railway company. The plaintiff alleged in his petition that he was travelling as a passenger for hire on one of the defendant's trains, being an express messenger on said train. In fact, he was upon said train only by virtue of his employment as express messenger of his company and the above-mentioned contract between his company and the railway company. The answer of the railway company set up two grounds of defence. The first admitted that Voigt was an express messenger on its train, but denied that he was travelling as a passenger for hire. The railway company also admitted that on the occasion of the injury complained of, the train on which he was riding came into collision with another of its trains, and that in the collision Voigt sustained injuries. The second ground of defence, inasmuch as it sets out the specific matter in controversy, is here set forth in detail:

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"'For a second and separate defence the railway company answered that on the day in question it was, and had for a long time prior thereto been, a corporation under the laws of Ohio engaged in the operation of its railroad from Cincinnati to St. Louis and other places, and was so engaged at the time of the collision referred to, and that on the 1st day of March, 1895, it entered into a contract with the United States Express Company, a joint stock company duly authorized by law to carry on the express business and to enter into such contract, and that by said contract it was agreed between the express company and the railway company, among other things, that the railway company would furnish for the express company, on the railway company's line between Cincinnati and St. Louis, cars adapted to the carriage of such express matter as the express company desired to have transported over said line, and that it was part of said contract that one or more employés of said express company should accompany said goods in said cars over the said line of said railroad, and for such purpose should be transported in said cars free of charge; and that it was further provided in said contract that the express company should protect the railway company and hold it harmless from all liability the railway company might be under to employés of the express company for injury they might sustain while being transported by the railway company over its line for the purpose aforesaid, whether the injuries were caused by negligence of the railway company or its employés or otherwise. The railway company further averred that, pursuant to said contract with the express company, it placed upon its line of railroad for said express company certain cars known as express cars, and that it was hauling one of said cars on one of its trains on the 30th of December, 1895, at the time said collision occurred, and that prior to the time of the accident Voigt had made application to the express company in writing for employment by it as an express messenger, and that in pursuance to said application he was, prior to and at the time of the collision, employed by the express company under a contract in writing between him and it, by the terms whereof he did assume the risk of all accidents and

injuries that he might sustain in the course of his said employment, whether occasioned by negligence and whether resulting in death or otherwise, and did undertake and agree to indemnify and hold harmless the said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such injury resulted from negligence or otherwise, and did agree to pay to said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and did agree to execute and deliver to the corporation operating the transportation line (in this instance the railway company), upon which he might be injured, a good and sufficient release under his hand and seal of all claims, demands and causes of action arising out of any such injury or connected with or resulting therefrom, and did ratify all agreements made by the express company with any transportation line (in this instance said railway company), in which said express company had agreed or might agree that the employés of said express company should have no cause of action for injuries sustained in the course of their employment upon the line of such transportation company; and that the said Voigt did further agree to be bound by each and every of the agreements above mentioned as fully as if he were a party thereto. He did agree that his contract with the express company should inure to the benefit of any corporation upon whose line said express company should forward merchandise (in this instance the said railway company), as fully and completely as if made directly with the corporation. In said defence it was further set forth that at the time the plaintiff sustained the injuries for which the suit was brought he was in an express car being transported by the railway company over its line from Cincinnati to St. Louis, pursuant to said contract between said express company and the railway company, and that said Voigt was at the time of the collision upon said car in pursuance to his contract with said express company and not otherwise.'

"To this second defence a demurrer was interposed by Voigt on the ground that the allegations therein did not constitute a

defence to the action. Upon the hearing of this demurrer it was sustained, and an entry was made of record finding the demurrer well taken. The opinion of the court sustaining the demurrer is published in 79 Fed. Rep. 560. The decision of the court went upon the ground that although Voigt was an express messenger riding upon an express car in the circumstances stated, he was a passenger for hire and entitled to the rights accorded by law to ordinary passengers travelling by a train of a common carrier, and further that it was not competent for the railway company to absolve itself from the duties which rest upon a common carrier in reference to its passengers. A stipulation in writing was filed waiving a trial by jury, and the case was tried by the court. The finding of the issues was in favor of the plaintiff and the damages were assessed at the sum of $6,000.00, and judgment was thereupon entered that the plaintiff recover that sum with costs. The defendant brings the case here on writ of error, and assigns errors, the substance of which is involved in the ruling of the court below sustaining the demurrer to the second defence of the answer of the defendant, and the controversy here involves the question whether in point of law a messenger of an express company, occupying a car of a railway company assigned to an express company for the prosecution of its business under a contract fixing the relations of the railway company and the express company, which, for the consideration shown by the contract, absolves the railway company from the consequence of its negligence to the express company and its employés, and to which the employé agrees, upon entering the service of the express company, stands in the ordinary relation of a common carrier of passengers for hire to the employé of the express company. The rule is undoubtedly well settled that a railway company standing in the relation of a common carrier to a passenger for hire cannot absolve itself for liability from the consequences of its negligence in carriage, but the members of the court are in doubt whether the defendant in error comes within the rule above mentioned, and, therefore, upon the foregoing statement of fact it is ordered that the following question be certified to the Supreme Court of the United States for its instruction :

Statement of the Case.

"*Question.*

"A railroad company, engaged as common carrier in the business of transporting passengers and freight for hire, entered into a contract in writing with an express company authorized by law to do and actually doing the business known as express business, by which contract the railroad company agreed, solely upon the considerations and terms hereinafter mentioned, to furnish for the exclusive use of such express company, in the conduct of its said express business over said railway company's lines, certain privileges, facilities and express cars to be used and employed exclusively by said express company in the conduct of such express business; and to transport said cars and contents, consisting of express matter, in its fast passenger trains, together with one or more persons in charge of said express matter, known as express messengers, for that purpose to be allowed to ride in said express cars; to transport such express messengers for the purposes and under the circumstances aforesaid free of charge. And by said contract it was agreed on the part of said express company to pay said railroad company for such privileges and facilities and for the furnishing and use of said express car or cars, and for such transportation thereof, a compensation named in said contract; and by which contract it was further agreed by the express company to protect the railroad company and hold it harmless from all liability it might be under to employés of the express company for any injuries sustained by them while being so transported by said railroad company, whether the injuries were caused by negligence of the railroad company or its employés or otherwise. A person made application to said express company in writing to be employed by it as express messenger on the railroad of a company, between which and such express company a contract as aforesaid existed, and such applicant, pursuant to the application aforesaid, was employed by said express company under a contract in writing signed by him and it, whereby it was agreed between him and such express company that he did assume the risk of all accident or injury he might sustain in the course of said employment, whether occasioned by negligence or otherwise, and did undertake and agree to indemnify

and hold harmless said express company from any and all claims that might be made against it arising out of any claim or recovery on his part for any damages sustained by him by reason of any injury, whether such damage resulted from negligence or otherwise, and to pay said express company on demand any sum which it might be compelled to pay in consequence of any such claim, and to execute and deliver to said railroad company a good and sufficient release under his hand and seal of all claims and demands and causes of action arising out of or in any manner connected with said employment, and expressly ratified the agreement aforesaid between said express company and said railroad company.

"Does said railroad company assume, toward such express messenger while being carried in the course of his said employment in one of said express cars attached to a passenger train of said railroad company, pursuant to the contracts aforesaid, the ordinary liability of a common carrier of passengers for hire so as to render said railroad company liable as such to said express messenger, notwithstanding the contracts aforesaid, for injuries he might sustain by reason of a collision between the train to which said express car is attached and another train of said railroad company, caused by the negligence of employés of the railroad company?"

Mr. Edward Colston for plaintiff in error. *Mr. Judson Harmon*, *Mr. A. W. Goldsmith* and *Mr. George Hoadly, Jr.*, were on his brief.

Mr. Charles M. Cist for defendant in error. *Mr. Edgar W. Cist* was on his brief.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The question we are asked to answer is, whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger, in the manner and circumstances heretofore stated, by

invoking that principle of public policy which has been held to forbid a common carrier of passengers for hire to contract against responsibility for negligence?

The Circuit Judge thought the case could not be distinguished from the case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, where a recovery was maintained by a drover injured whilst travelling on a stock train of the New York Central Railroad Company proceeding from Buffalo to Albany, on a pass which certified that he had shipped sufficient stock to give him a right to pass free to Albany, but which provided that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. This court held that a drover travelling on a pass, for the purpose of taking care of his stock on the train, is a passenger for hire, and that it is not lawful for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has been frequently followed, and it may be regarded as establishing a settled rule of policy. *Railway Co.* v. *Stevens*, 95 U. S. 655; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397.

The principles declared in those cases are salutary, and we have no disposition to depart from them. At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing &c. Co.* v. *Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public

policy to consider — that you are not lightly to interfere with this freedom of contract."

Upon what principle, then, did the cases relied on proceed, and are they applicable to the present one? They were mainly two. First, the importance which the law justly attaches to human life and personal safety, and which therefore forbids the relaxation of care in the transportation of passengers which might be occasioned by stipulations relieving the carrier from responsibility. This principle was thus stated by Mr. Justice Bradley in the opinion of the court in the case of *Railroad Co.* v. *Lockwood:* "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties — an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put aside the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms."

The second fundamental proposition relied on to nullify contracts to relieve common carriers from liability for losses or injuries caused by their negligence is based on the position of advantage which is possessed by companies exercising the business of common carriers over those who are compelled to deal with them. And again we may properly quote a passage from the opinion in the *Lockwood case* as a forcible statement of the situation:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million.

He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier may present; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable or practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment, then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is almost concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality."

Upon these principles we think the law of to-day may be fairly stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding. 2. That all attempts of carriers, by general notices or special contract, to escape from liability for losses to shippers, or injuries to passengers, resulting from want of care or faithfulness, cannot be regarded as reasonable and just, but as contrary to a sound public policy, and therefore invalid.

But are these principles, well considered and useful as they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case?

We have here to consider not the case of an individual

shipper or passenger, dealing, at a disadvantage, with a powerful corporation, but that of a permanent arrangement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country. We need not, in this inquiry, examine the nature of the business of an express company, or rehearse the particular services it renders the public. That has been done, sufficiently for our present purpose, in the *Express cases*, 117 U. S. 1, and from the opinion in that case we shall make some pertinent extracts:

"The express business has grown to an enormous size, and is carried on all over the United States and in Canada, and has been extended to Europe and the West Indies. It has become a public necessity, and ranks in importance with the mails and the telegraph. It employs for the purpose of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the Government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

* * * * *

"When the business began, railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true that no railroad company in the United States has ever refused to transport express matter for the public, upon the application of some express company, of some form of legal constitution. Every railway company has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created of that class of matter which is known as express matter. Express companies undoubtedly have invested their capital and built up their busi-

ness in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary, it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. These contracts, as is shown by those in this record, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. . . .

"The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have, from the beginning, been provided for

the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of the passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another express company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. . . .

"In this way three or four important and influential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying, when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles; the American, two hundred roads, with a mileage of 28,000 miles; and the Southern, ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements

with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time."

The cases in which the opinion from which the foregoing extracts are taken were suits brought by certain express companies which had been doing business on certain railroads, under special contracts between the respective companies, to compel the railroad companies to permit them to continue business on the roads on terms to be fixed by the courts; in other words, to demand as a right what they had theretofore enjoyed by permission of special contracts. This the court declined to do, and directed the bills to be dismissed.

Our citations have been intended partly to disclose, in a succinct form, the nature of the express business, but more particularly to show that, in essence, the express business is one that requires the participation of both the companies on terms agreed upon in special contracts, thus creating, to a certain extent, a sort of partnership relation between them in carrying on a common carrier business.

We are not furnished in this record with an entire copy of

the contract between the plaintiff in error, The Baltimore and Ohio Southwestern Railway Company, and The United States Express Company, but it is sufficiently disclosed in the statement made by the Judges of the Circuit Court of Appeals, that the companies were doing an express business together as common carriers under an agreement entered into on March 1, 1895; that by said contract it was agreed that the railway company would furnish, on its line between Cincinnati and St. Louis, for the express company, cars adapted to the carriage of express matter over said line; that one or more employés of said express company should accompany said goods in said cars over the said line, and for such purpose should be transported in said cars, free of charge; that the express company should protect the railway company and hold it harmless from all liability for injuries sustained by the employés of the express company while being transported for the said purpose over the railroad; that Voigt, the defendant in error, had agreed in writing to indemnify the express company against any liability it might incur by reason of said agreement between the companies, so far as he was concerned, and further agreed to release the railroad company from liability for injuries received by him while being transported in the express cars; that, in consideration of such agreement on his part, Voigt was employed as an express messenger, and while so employed, and while occupying as such messenger a car assigned to the express company, received injuries occasioned by a collision, on December 30, 1895, between the train which was transporting the express car and another train belonging to the same railroad company.

It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the ex-

press company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the Lockwood and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no local compulsion to enter into.

The relation of an express messenger to the transportation company, in cases like the present one, seems to us to more nearly resemble that of an employé than that of a passenger. His position is one created by an agreement between the express company and the railroad company, adjusting the terms of a joint business — the transportation and delivery of express matter. His duties of personal control and custody of the goods and packages, if not performed by an express messenger, would have to be performed by one in the immediate service of the railroad company. And, of course, if his position was that of a common employé of both companies, he could not recover for injuries caused, as would appear to have been the present case, by the negligence of fellow-servants.

However this may be, it is manifest that the relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and that to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension of the doc-

trine of public policy than was justified by the facts and reasoning in the *Lockwood case.*

This subject has received attentive consideration in several of the state courts.

In *Bates* v. *Old Colony Railroad*, 147 Mass. 255, it was held that if an express messenger holding a season ticket from a railroad company and desiring to ride for the conduct of his business in a baggage car, agrees to assume all risk of injury therefrom, and to hold the company harmless therefor, the agreement is not invalid as against public policy, and he cannot recover for injuries caused by negligence of the company's servants. In its opinion the court said:

"The question of a right of carriers to limit their liability for negligence in the discharge of their duties as carriers by contract with their customers or passengers in regard to such duties does not arise under the contract as construed in this case. See *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Griswold* v. *New York & New England Railroad*, 53 Conn. 371. It was not a contract for carriage over the road, but for the use of a particular car. The consideration of the plaintiff's agreement was not the performance of anything by the defendant which it was under any obligation to do, or which the plaintiff had any right to have done. It was a privilege granted to the plaintiff. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. Having these rights, he sought something more. . . . The fact that the plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the plaintiff was not unreasonable or against public policy. He was there as a servant engaged with the servants of the railroad company in the service of transportation on the road. His duties were substantially the same as those of the baggage-master in the same car; the latter relating to merchandise carried for passengers, and the former to merchandise carried for the express company. His actual relations to the other servants of the railroad corporation engaged in the transportation were substantially the same as

those of the baggage-master, and would have been the same had he been paid by the corporation instead of by the express company. Had the railroad done the express business, the messenger would have been held by law to have assumed the risk of the negligence of the servants of the railroad. It does not seem that a contract between the express company and the plaintiff on the one hand, and the defendant on the other, that the express messenger in performing his duties should take the same risk of injury from the negligence of the servants of the railroad engaged in the transportation that he would take if employed by the railroad to perform the same duties, would be void as unreasonable or as against public policy."

The same ruling prevailed in the subsequent case of *Hosmer* v. *Old Colony Railroad*, 156 Mass. 506.

Robertson v. *Old Colony Railroad*, 156 Mass. 526, was an action brought for personal injuries caused to the plaintiff, an employé of the proprietors of a circus, while riding in a car belonging to the proprietors, drawn by the defendant company over its road under a written agreement, in which it was provided that the circus company should agree to exonerate and save harmless the defendant from any and all claims for damages to persons or property during the transportation, however occurring, and it was held that, as the defendant company was under no common law or statutory obligation to carry the plaintiff in the manner he was carried at the time of the accident, it did not stand towards him in the relation of a common carrier, and that the plaintiff could not recover.

Griswold v. *New York & New England Railroad*, 53 Conn. 371, where a restaurant keeper had the privilege to sell fruits and sandwiches on the trains and to engage and keep a servant for that purpose on the trains, riding on a free pass, it was held that such servant could not recover for injuries sustained on the train caused by the negligence of the company's servants, because he was not a passenger.

The Supreme Court of Michigan, in *Coup* v. *Wabash, St. Louis &c. Railway Co.*, 56 Michigan, 111, where a railroad company, under a special agreement, was to furnish men and motive power to transport a circus of the plaintiff from Cairo

to Detroit on cars belonging to the plaintiff, stopping at certain named points for exhibition, the plaintiff paying a fixed price therefor, held, that such transportation was not a transaction with a common carrier as such; that the contract was valid, and that the railway company was not liable for injury due to negligence.

Where a railroad company made a special contract in writing with the owner of a circus to haul a special train between certain points, at specified prices, and stipulating that the railroad company should not be liable for any damage to the persons or property of the circus company from whatever cause, it was held by the Circuit Court of Appeals of the Seventh Circuit, citing *Coup* v. *Railroad Co.*, 56 Michigan, 111, and *Robertson* v. *Old Colony Railroad*, 156 Mass. 506, that the railroad company was not acting as a common carrier, and was not liable under the contract for injuries occasioned by negligent management of its trains. In its opinion the court quoted the following passage from *Railroad Co.* v. *Lockwood:* "A common carrier may undoubtedly become a private carrier or bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry." *Chicago, Milwaukee & St. Paul Railroad* v. *Wallace*, 24 U. S. App. 589.

Louisville, New Albany & Chicago Railway v. *Keefer*, 146 Indiana, 21, 34, was a case in all respects like the present. It was a suit by a messenger of the American Express Company against the railroad company for personal injuries. The contracts between the express company, the messenger and the railroad company were in terms similar to those existing in the present case, and the defence was the same as that made here. It was held that the contracts were valid and that the defence was good. It was said:

"Under the doctrine declared in the *Express cases*, 117 U. S. 1, the property was being carried by appellant, not as a common carrier in the performance of a public duty, but being carried, with a messenger in charge, as a private carrier, the right to have it and him carried having first been secured to the express company by private contract, the only way known

to the law by which the right, either as to the goods or appellee as messenger in charge, could be acquired.

"Appellee, when he went on the appellant's train and took charge of the express packages in the baggage car, did not go as a passenger who merely desired to be carried on the train from one point to another. Carriage was not the object of his going upon the train; that was merely incidental. His purpose was not to be upon the train, in cars provided for passengers, but that he might handle and care for the property of his employer thereon, in the space set apart in the baggage car for that purpose. Under the authorities cited it was not the duty of appellant, as a common carrier, to carry for the express company the goods or messenger in charge of them. The contract between appellant and the express company gave it and its messenger rights which appellant as a common carrier could not have been compelled to grant."

By the Supreme Court of Indiana, in *Pittsburgh, Cincinnati &c. Railway* v. *Mahoney*, 148 Indiana, 196, it was held that railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry, and that a release by an employé of an express company of all liability for injuries sustained by the negligence of the employé or otherwise includes the liability of the express company to hold a railroad company, with which it does business, harmless against claims by employés of the express company for injuries, and precludes an action against the railroad company for causing his death while in discharge of his duty as employé of such express company.

A precisely similar question was presented in the case of *Blank* v. *Illinois Central Company*, and was decided the same way, by the Appellate Court for the First District of Illinois, in an opinion rendered March 14, 1899. 80 Ill. App. 475. The court cites the *Express cases*, and approves and applies the reasoning in the Indiana cases; and this judgment has been affirmed by the Supreme Court of Illinois. 182 Illinois, 332.

The same doctrine prevails in the State of New York. *Bis-*

sell v. *New York Central Railroad*, 25 N. Y. 442; *Poucher* v. *New York Central Railroad*, 49 N. Y. 263. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *Railroad Co.* v. *Lockwood* to its full extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge.

As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the Government, and who pay no fare, are entitled to the rights of ordinary passengers for hire; and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith* v. *Nashville & Decatur Railroad*, 57 Fed. Rep. 165; *Gleeson* v. *Virginia Midland Railroad*, 140 U. S. 435; *Ketcham* v. *New York, Lake Erie &c. Railroad*, 133 Indiana, 346; *Seybolt* v. *Railroad Co.*, 95 N. Y. 562.

There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous it should be made to appear that the Government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

Brewer v. *New York, Lake Erie & Western Railroad*, 124 N. Y. 59, is also cited as a case wherein a recovery was maintained by an express messenger against a railroad company, and where there existed an agreement between the express company and the railroad company that the latter should be indemnified and protected against all risks and liabilities. But the court put its judgment against the railroad company

expressly upon the ground that the messenger had no knowledge or information of the contract between the companies, and was not himself a party to the agreement to exempt the railroad company.

Kenney v. *N. Y. Cent. &c. Railroad*, 125 N. Y. 422, was also a case where, in an action for damages by an express messenger against a railroad company, the plaintiff was permitted to recover, notwithstanding there was an agreement between the companies that the railroad company should be released and indemnified for any damage done to the agents of the express company, whether in their employ as messengers or otherwise. But it did not appear that there had been any assent to or knowledge of this contract on the part of the messenger; and the court said:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employés. The rule is firmly established in this State that a common carrier may contract for immunity from its negligence or that of its agents; but that to accomplish that object the contract must be so expressed and not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation except when the carrier's immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*."

Chamberlain v. *Pierson*, 59 U. S. App. 55, 64, in the Circuit Court of Appeals of the Fourth Circuit, was a case in which an express messenger was injured while travelling on a railroad which had a contract with the express company, exonerating the foreman from responsibility for injuries to the agents of the latter, and in which said agreement was ineffectually pleaded in bar of the action. The court said:

"The discussion of this feature of the case presents this question: Was the plaintiff below, as a messenger of the express company, bound by the contract between the railroad company and the express company to assume all risks to life and limb to which he was exposed in performing his

duties on the train as an express messenger? He was not a party to the contract, never ratified it, and in his testimony, when asked if he knew of this provision of the contract, answered, 'If I had known that I wouldn't have gone.'"

Without enumerating and appraising all the cases respectively cited, our conclusion is that Voigt, occupying an express car as a messenger in charge of express matter, in pursuance of the contract between the companies, was not a passenger within the meaning of the case of *Railroad Company* v. *Lockwood;* that he was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger, and that such a contract did not contravene public policy. Accordingly,

We answer the question submitted to us by the judges of the Circuit Court of Appeals in the negative; and it is so ordered.

Mr. Justice Harlan, dissenting.

In *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 384, it was held that a "common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law;" that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants;" that "these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter;" and that "a drover travelling on a pass, such as was given in this case, is a passenger for hire." The railroad pass referred to declared that its acceptance was to be considered a waiver of all claims for damages or injuries received on the train. The above principles have been recognized and enforced by this court in numerous cases.

I am of opinion that the present case is within the doctrines of *Railroad Co.* v. *Lockwood*, and that the judgment should be affirmed upon the broad ground that the defendant corpora-

tion could not, in any form, stipulate for exemption from responsibilty for the negligence of its servants or employés in the course of its business whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.